

**LIBRARY**  
**SUPREME COURT, U. S.**

## **TRANSCRIPT OF RECORD**

---

---

**Supreme Court of the United States**

**OCTOBER TERM, 1950**

**No. 146**

---

**ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,  
APPELLANTS,**

**vs.**

**SOUTHERN RAILWAY COMPANY**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT ALABAMA**

---

---

**FILED JUNE 24, 1950.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,  
APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT ALABAMA

## INDEX

	Original	Print
Record from U. S. D. C., Middle District of Alabama	1	1
Caption (omitted in printing)	1	
Complaint	2	1
Exhibit 1—Petition of Southern Railway Co. before Alabama Public Service Commission	18	14
Exhibit "A"—Statement showing operating results of passenger trains Nos. 11 and 16, March, 1947 to February, 1948, inclusive.	22	17
Exhibit 2—Service order 843 issued by Division 3 of I.C.C., October 21, 1949	23	19
Exhibit 3—Supplemental petition of Southern Railway Co. before Alabama Public Service Commission	24	21
Exhibit "C"—Statement showing operating results of passenger trains Nos. 11 and 16, March 1, 1948 to February 28, 1949	28	24
Exhibit "D"—Same, March 1, 1949 to September 30, 1949	29	25
Exhibit 4—Notice from Public Service Commission re I.C.C. Order 843, October 26, 1949	30	26

Record from U. S. D. C., Middle District of Alabama—  
Continued

Complaint—Continued

	Original	Print
Exhibits—Continued		
Exhibit 5—Service order 843-A issued by Division 3 of I.C.C., November 14, 1949	31	26
Exhibit 6—Telegram from Public Service Commission to Southern Railway Co., November 21, 1949 and reply thereto	33	28
Exhibit 7—Order of Alabama Public Service Commission in Docket No. 12225, November 22, 1949	37	31
Exhibit 8—Same, December 5, 1949	39	33
Exhibit 9—Timetable showing schedule of trains Nos. 15, 12, 11 and 16	43	37
Exhibit 10—Comparison of motor vehicle registrations in certain counties and the State of Alabama for license years 1939 and 1948	44	38
Exhibit 11—Ratio of persons eighteen years of age and over per registered automobile in the State of Alabama, 1910-1945, inclusive	46	39
Summons to answer bill of complaint	47	39
Temporary restraining order	49	40
Designation of the Three Judges to serve on the District Court of Three Judges	52	42
Defendants' motion to dismiss	53	43
Plaintiff's amendment to complaint	56	46
Defendants' amendment to the motion to dismiss	59	47
Defendants' motion to stay action	60	48
Defendants' answer to complaint	62	49
Exhibit "A"—Report and order of Alabama Public Service Commission in Docket No. 12221, January 9, 1950	68	54
Affidavit of Lamar Wiley, Secretary, Alabama Public Service Commission (omitted in printing)	76	
Testimony of Lamar Wiley taken in Open Court, January 12, 1950 (omitted in printing)	92	
Affidavit of George V. Bayliss (omitted in printing)	104	
Supplemental affidavit of George V. Bayliss (omitted in printing)	123	
Affidavit of W. J. G. Quinn (omitted in printing)	138	
Affidavit of Leslie Woodall, Jr. (omitted in printing)	154	
Transcript of testimony, proceedings and exhibits before Alabama Public Service Commission in Docket No. 12221, December 8, 1949 (omitted in printing)	173	
Opinion of Court, Kennamer, J.	380	63
Final judgment	386	69
Order allowing appeal	388	70
Appeal bond (omitted in printing)	398	
Defendants' designation of record on appeal (omitted in printing)	399	



# INDEX

iii

## Record from U. S. D. C., Middle District of Alabama— Continued

	Original	Print
Order enlarging time for docketing and filing record (omitted in printing)	401	
Stipulation of parties as to original exhibits (omitted in printing)	402	
Order that original transcript of proceedings before the Alabama Public Service Commission, with Ex- hibits Nos. 6, 7, 8, 15, and 16, and A, thereto, may be included in the record on appeal (omitted in printing)	403	
Clerk's certificate (omitted in printing)	404	
Statement of points to be relied upon and designation of record	405	71
Order noting probable jurisdiction	407	73





[fols. 1-2]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF ALABAMA, NORTH-  
ERN DIVISION**

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

v.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, Its  
President, and Jimmy Hitchcock and C. C. (Jack) Owen,  
Associate Commissioners; and A. A. Carmichael, Attor-  
ney General of the State of Alabama, Defendants

COMPLAINT—Filed December 6, 1949

The above named plaintiff, complaining of the above  
named defendants, alleges:

1. Plaintiff, Southern Railway Company, is and was at  
the times hereinafter stated, a corporation organized and  
existing under the laws of the State of Virginia, and as  
such is engaged as a common carrier by railroad of persons  
and property between points within the State of Alabama,  
and between points within the State of Alabama on the  
one hand and points in other states throughout the south  
on the other hand, and as such common carrier is subject  
to the jurisdiction of the Alabama Public Service Commis-  
sion and the Interstate Commerce Commission, respectively.

[fol. 3] 2. The defendant, Alabama Public Service Com-  
mission, consisting of a President and two Associate Com-  
missioners, is and was at the times hereinafter stated, an  
administrative body, created under the laws of the State  
of Alabama, (Title 48, § 1, Code 1940) and authorized under  
the laws of the State of Alabama to exercise certain regu-  
latory powers over plaintiff, and other common carriers  
by railroad, (Title 48, § 106, Code 1940). The principal  
office and official domicile of said Commission is located in  
the City of Montgomery, County of Montgomery, State of  
Alabama, being within the Middle Judicial District of the  
State of Alabama, and the Northern Division thereof.  
(Title 48, § 11, Code 1940). Defendant Persons, is Presi-

dent, and defendants Hitchcock and Owen, are Associate Commissioners, of said Commission, and defendant Carmichael is Attorney General for the State of Alabama, and are citizens of the State of Alabama and residents of Montgomery, Montgomery County, located in the Middle Judicial District of Alabama, and the Northern Division thereof. Defendant Carmichael, as Attorney General of the State of Alabama, is by the statutes of said state charged with the supervision and control of legal proceedings in behalf of the State of Alabama, and is attorney for Defendant Alabama Public Service Commission.

3. This is a suit of a civil nature between citizens of different states, and arises under the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

4. By Title 48, § 35 and § 106, of the Code of Alabama of [fol. 4] 1940, plaintiff, and other common carriers by railroad, are required to file an application with defendant Commission for a permit to abandon passenger train service and obtain from the Commission a permit allowing such abandonment before it shall abandon operation of passenger service on its lines of railroad in Alabama. No standards for the guidance of the Commission are prescribed, and plaintiff is advised and believes, and therefore alleges, that the statutes are unconstitutional and void as an unlawful delegation of legislative power. Nevertheless, in compliance therewith, plaintiff, on, to-wit, the 13th day of September, 1948, filed with defendant Commission an application for authority to discontinue the operation of two certain interstate passenger trains then being operated daily between Birmingham, Alabama, and Columbus, Mississippi, to-wit:

Train No. 11, leaving Birmingham at 4:00 p. m., arriving Columbus at 8:45 p. m.

Train No. 16, leaving Columbus at 6:00 a. m., arriving at Birmingham at 10:30 a. m.

Attached to said application and made a part thereof was "Exhibit A", which showed that plaintiff's operation of said two passenger trains for the 12-months period from March 1947 to February 1948, inclusive, showed that the



wages for the train and engine crews and the pay roll taxes paid by plaintiff for the benefit of said crews, plus train fuel consumed in the operation of said trains, approximated the total amount of gross revenue earned by said trains from the handling of passengers, mail, and express, and further, that in the light of other direct expense of their operation [fol. 5] the total cost of direct expense exceeded the total gross revenues for said 12-months period by \$63,613.24. Plaintiff attaches a copy of said application and "Exhibit A" thereto to this complaint, marked "Exhibit No. 1", to which reference is prayed for a more complete understanding of said application.

5. In compliance with Service Order 843 issued by Division 3 of the Interstate Commerce Commission on October 21, 1949, a copy of which is hereto attached, marked "Exhibit No. 2" and made a part hereof, plaintiff, effective at 11:59 p. m., October 25, 1949, discontinued operation of its said passenger trains numbers 11 and 16 between Birmingham and Columbus, Mississippi, and said trains have not been operated since they were so discontinued. At the same time and under the same order plaintiff discontinued the operation of its passenger trains numbers 1 and 2, between Sheffield and Parish, Alabama; its passenger trains 7 and 8, between Sheffield, Alabama, and Chattanooga, Tennessee; and its mixed trains numbers 15 and 16, between Selma and Wilton, Alabama.

6. On, to-wit, the 10th day of November 1949, plaintiff filed in the pending cause, before the Alabama Public Service Commission, its Supplemental Petition seeking therein authority from said Commission to be relieved of the necessity of restoring the operation of said passenger trains within the State of Alabama. In said Supplemental Petition the further losses sustained in the operation of said passenger trains from March 1, 1948 to September 30, 1949, inclusive, are set out. Such losses from the operation of said two passenger trains as shown by the original petition and the Supplemental Petition have become progressively [fol. 6] heavier and more burdensome. While such losses for the twelve month period March 1, 1947 to February 29, 1948, inclusive, amounted to \$63,613.24 as appears from paragraph 4 hereof, for the succeeding twelve month period March 1, 1948 to February 28, 1949, inclusive, such losses amounted to \$80,555.78, and for the succeeding seven month

period from March 1, 1949 to September 30, 1949, inclusive, such losses amounted to \$63,340.68 as shown by said supplemental petition, a copy of which with its exhibits is attached hereto identified as "Exhibit No. 3".

7. After the filing, on September 13, 1948, of its original petition with the defendant Commission, for authority to discontinue its said two passenger trains, numbers 11 and 16, submitted herewith as "Exhibit No. 1," plaintiff requested and urged the defendant Commission repeatedly, beginning with September 29, 1948, that the petition be set down for hearing. Since the filing of plaintiff's Supplemental Petition with the defendant Commission on November 10, 1949 plaintiff has also urged that its Supplemental Petition, together with its original Petition, be set down for hearing while said two passenger trains 11 and 16 are discontinued under Service Order No. 843 of the Interstate Commerce Commission, described in paragraph 5 hereof, but the defendant Commission refused to do so and notified plaintiff, emphatically, that it would not hear either plaintiff's Supplemental Petition or its original Petition until the operation of said two passenger trains 11 and 16 is restored. Not until November 18, 1949 was plaintiff advised by defendant Commission that its said original Petition for authority to discontinue operation of said two passenger trains had been set down for hearing at the Court House at Fayette, Alabama, on December 8, 1949. At the same time it was again made clear that the restoration of operation of the two trains was a prerequisite to the hearing.

[fol. 7] 8. On October 26, 1949, defendant Alabama Public Service Commission, issued and served upon plaintiff a notice, to the effect that the operation of all passenger trains discontinued under the aforesaid Interstate Commerce Commission Service Order be restored to service within 24 hours after said service order might be rescinded. A copy of said notice is hereto attached and made a part hereof, identified as "Exhibit No. 4."

9. Under date of November 14, 1949, Division 3 of the Interstate Commerce Commission issued its Service Order 843-A, vacating and setting aside its Service Order No. 843, described in paragraph 5 of this complaint, effective at 11:59 P. M., November 20, 1949. A copy of said Service Order No. 843-A is attached hereto as "Exhibit No. 5."

In response to said Service Order No. 843-A, plaintiff, on November 18, 1949, advised defendant Alabama Public Service Commission, that it would, on November 21, 1949, restore the operation of said passenger trains Numbers 1 and 2, between Sheffield and Parrish, Alabama; said passenger trains numbers 7 and 8, between Sheffield, Alabama, and Chattanooga, Tennessee; and said mixed trains numbers 15 and 16, between Selma and Wilton, Alabama; and the operation of all of said six trains was in fact restored on November 21, 1949. In addition thereto and on the same date, one of plaintiff's attorneys sent to the Commission a Western Union wire reading as follows:

"Washington, D. C., November 18, 1949.

"Honorable Gordon Persons, President,  
Alabama Public Service Commission,  
Montgomery, Alabama

"Following our telephone conversation day before yesterday I came to Washington to confer with management of Southern Railway with reference to our supplemental petition for permission to keep out of service trains 11 and 16 between Birmingham and Columbus. I understand the other six trains discontinued under the Order of the ICC will be restored to service promptly in keeping with the Commission's requirement of October 26th addressed to all railroads. The management feels, as I do, that we are entitled to a hearing on our supplemental petition on trains 11 and 16 and we hope the Commission can see its way clear to give it to us promptly.

J. T. Stokely  
10:47 AM"

In response to that wire, and on the same date defendant Commission by its President telephoned plaintiff's said attorney that the application for authority to discontinue said trains Nos. 11 and 16 had been set for hearing at Fayette, [fol. 8] Alabama, on December 8, 1949 as shown in paragraph 7 hereof and at the same time reaffirmed the advice theretofore given that a hearing would not be had unless said two trains were back in operation.

10. Plaintiff further shows that on November 22, 1949, it received at its general office in Washington from the defendant Commission a Western Union wire asking that



plaintiff wire the Commission whether the plaintiff intended to immediately restore the operation of said two trains Nos. 11 and 16 and plaintiff replied on the same date that under the circumstances it could not see its way clear to restore the trains until a hearing on its said supplemental petition for authority to keep them out of service. Copies of said two wires are attached hereto and made a part hereof being identified as "Exhibit No. 6". On the same date, plaintiff's said attorney in a telephone conversation with the President of defendant Commission advised in substance to the same effect. In that same telephone conversation the President of defendant Commission advised that it would go ahead with the hearing set for December 8, 1949 although it had felt that a hearing should be withheld until said trains were restored to operation.

11. Plaintiff further shows that following said exchange of wires and said telephone conversation set forth in paragraph 10 hereof, the defendant Alabama Public Service Commission issued an order to the plaintiff to appear before the Commission at its office in Montgomery, Alabama, at 2:00 P. M. Friday, November 25, 1949, to show cause, if any, why the defendant Commission should not enter an order requiring the plaintiff to restore the operation of its said trains Nos. 11 and 16 between Birmingham, Alabama, and the Mississippi State line. A copy of said order of the defendant Commission is attached hereto and made a part hereof identified as "Exhibit No. 7".

12. Plaintiff further shows that in response to said order described in paragraph 11 hereof, it appeared before the defendant Commission as required by said order through its attorneys and officers with its witnesses prepared to show the tremendous losses incurred in the operation of said trains before they were discontinued under said I.C.C. Service Order on October 25, 1949; the remaining passenger service on said line of railroad between Birmingham, Alabama and Columbus, Mississippi, which plaintiff insists is adequate; the improved highways substantially parallel- [fol. 9] ing its said line of railroad between Birmingham, Alabama and the Mississippi State line and all the facts in detail showing why the operation of said two passenger trains Nos. 11 and 16 should not be restored; but the defendant Commission refused to permit said witnesses to testify and refused to receive any evidence of the character

which plaintiff proposed, to which action of the defendant Commission plaintiff duly excepted. Before the conclusion of said abortive hearing, plaintiff requested the defendant Commission if it made an order requiring said two passenger trains Nos. 11 and 16 to be restored to service that it suspend the effective date of such order until after the hearing on said defendant's applications set at Fayette, Alabama, for December 8, 1949 and after a decision of the defendant Commission on said applications. However, the Commission on, to-wit, the 5 day of December, 1949 entered an order requiring plaintiff to restore the operation of said two passenger trains effective on the 5 day of December, 1949, as per a copy thereof attached hereto and made a part hereof, identified as "Exhibit No. 8".

Said hearing on the defendant Commission's order to show cause was a mere sham and pretense and utterly lacking in due process of law under the Constitution of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States.

13. With the operation of said trains Nos. 11 and 16 discontinued the line of railroad between Birmingham, Alabama and Columbus, Mississippi is served by plaintiff's mixed trains Nos. 15 and 12. The passenger equipment of these trains are a standard seventy foot passenger car partitioned for white and colored passengers with separate toilets for men and women in each end of the car, and also a standard mail, express and baggage car with railway post office in one end in charge of a R. P. O. clerk, the rest of the car being used for storage mail, express, and baggage, if any, with an express messenger in charge. The trains operate on convenient schedules. No. 15 leaves Birmingham at 7:15 A. M. arriving Columbus, Mississippi 1:15 P.M. No. 12 leaves Columbus, Mississippi at 1:30 P.M. arriving Birmingham 7:30 P.M. These trains run well on time, make all stops, do very little switching and coupled with improved paralleling highway facilities for busses and private automobiles render adequate service to the territory served between Birmingham and Columbus. A copy of plaintiff's timetable showing the schedules of said trains Nos. 15 and 12 as well as the schedules of said trains Nos. 11 and 16 before they were discontinued under said I.C.C. Service Order 843 is attached hereto and made a part hereof being identified as "Exhibit No. —".

The area in the several counties of Alabama through which plaintiff's line of railroad between Birmingham, Alabama and Columbus, Mississippi extends and over which said mixed trains Nos. 15 and 12 operate, and over which said trains Nos. 14 and 16 operated before they were discontinued, is traversed by improved state highways, substantially paralleling plaintiff's line of railroad through said several counties over which common carrier bus lines and private automobiles are extensively operated. Attached hereto, and marked "Exhibit No. —", and made a part hereof, is a statement comparing motor vehicle registrations in said counties and in the State as a whole for the license years 1939 and 1948. Also attached hereto and made a part hereof, marked "Exhibit No. —", is a statement of the ratio of persons eighteen years of age and over per registered automobile in the state of Alabama, by five-year periods, 1910-1945, inclusive. Said exhibits show the substantial and rapidly increasing use of the highways, and accounts for the little use formerly made by the traveling public of plaintiff's trains Nos. 11 and 16.

In addition to the loss of passenger traffic due to the severe competition of busses and private automobiles over said highways adjacent to plaintiff's said line of railroad, the substantial loss to plaintiff in the operation of said trains Nos. 11 and 16 was also due in part to the greatly increased cost of fuel, materials, supplies and wages.

[fol. 11] 14. In addition to its application for authority to discontinue the operation of its local passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, filed on September 13, 1948, and its supplemental application filed on, to-wit, November 10, 1949, asking authority not to restore the operation of these two trains after they had been discontinued on October 25, 1949, under said I. C. C. Service Order No. 843, the plaintiff has in the last two years filed similar applications for authority to discontinue said two local passenger trains Nos. 1 and 2 operating between Birmingham and Sheffield, Alabama, and said two local passenger trains Nos. 7 and 8 operating between Sheffield, Alabama and Chattanooga, Tennessee.

The first of said applications, for authority to discontinue its two local passenger trains Nos. 1 and 2 was filed on the 24th day of February, 1948, was not set for hearing



until the 8th day of July, 1948 at which time the hearing was continued over the plaintiff's objections and protest on a requirement of the Commission for one month's test period of freight earnings of said line. The hearing was resumed on the 7th day of October, 1948 when the evidence was concluded and the case submitted. Plaintiff before the first hearing amended its application to propose, if the Commission required it, the substitution of a mixed train service in lieu of said two passenger trains. It offered on the first hearing evidence to the effect that direct expense only of the operation of said trains Nos. 1 and 2 for the twelve month period, March 1, 1947 to February 29, 1948, inclusive, amounted to \$112,008.98, while the revenue of its said two trains for the same twelve month period amounted to only \$33,286.96, showing a loss of direct expense over actual revenue for the period of \$78,722.02, or approximately \$6,500.00 per month. The month of July, 1948 was with the approval of the defendant Commission selected as the month's test period required and on the adjourned hearing plaintiff showed that the operation of both freight and passenger service on the line between Sheffield and Parrish, Alabama, for the month resulted in a net railway operating income of only \$2,646.18, a rate of return of only 0.68 percent on the investment in railway (road) property [fol. 12] used in said transportation service. Notwithstanding the showing of the heavy losses in passenger service for said twelve month period and the result of the operation of both freight and passenger service on the line for said month's test period, the defendant Commission after holding the case under consideration until May 13, 1949 denied the plaintiff's said application to discontinue the operation of plaintiff's said two passenger trains Nos. 1 and 2 and denied plaintiff's proposal to substitute mixed train service therefor. Plaintiff took an appeal from said order of the defendant Commission denying its said application to the Circuit Court of Montgomery County where the case is now pending.

The other application, for authority to discontinue the operation of said two local passenger trains Nos. 7 and 8 operating between Sheffield, Alabama and Chattanooga, Tennessee, was filed on, to-wit, September 13, 1948. After repeated requests that the application be set down for hearing the defendant Commission on March 25, 1949 set

it for hearing at Huntsville, Alabama on June 2, 1949. On May 12, 1949 the Commission continued the hearing to August 4, 1949, and again on July 11, 1949 the defendant Commission again continued the hearing to October 6, 1949 when the application was heard by three members of the defendant Commission's staff, none of the defendant Commissioners being present. The testimony was taken and the case was submitted on that date. On the hearing plaintiff offered in evidence the direct expense of the operation of said two local passenger trains for the twelve month period March 1, 1947 to February 29, 1948, inclusive, which amounted to \$177,553.66, and also offered in evidence the total revenue of said trains for the same period which amounted to only \$98,842.92, resulting in a loss in direct expense over actual revenue for the period of \$78,710.74, or approximately \$6,500.00 per month. Plaintiff likewise offered in evidence the direct expense of operation of said two local passenger trains for the twelve month period March 1, 1948 to February 28, 1949, inclusive, which amounted to \$182,283.20, and also offered in evidence the total revenue of said two local passenger trains for the same period which amounted to \$79,956.28, resulting in a loss of direct expense over actual revenue for the twelve month period of \$102,326.93, or approximately \$8,500.00 [fol. 43] per month. Plaintiff likewise offered in evidence the direct expense of said two local passenger trains for the five month period March 1, 1949 to July 31, 1949, inclusive, which amounted to \$84,437.84 and also offered in evidence the total revenue of said two local passenger trains for the same five month period which amounted to \$30,745.28, resulting in a loss in direct expense over actual revenue for the five month period of \$53,692.56, or approximately \$10,500.00 per month.

The defendant Commission still has said application for the authority to discontinue the operation of said two local passenger trains Nos. 7 and 8 under advisement and no decision on said application has yet been rendered.

The cavalier treatment thus accorded by the Commission to the plaintiff and to its said three applications for authority to discontinue the operation of its said six local passenger trains Nos. 11 and 16, Nos. 1 and 2, and Nos. 7 and 8 shows a deliberate course on the part of the defendant Commission of procrastination and delay resulting in the

continued and continuing heavy losses to the plaintiff from the operation of its said six local passenger trains, thereby depriving plaintiff of its property without due process of law and denying to the plaintiff the equal protection of the law in violation of the Constitution of the state of Alabama and of the Commerce Clause and the Fifth and Fourteenth Amendments of the Constitution of the United States.

15. Plaintiff avers that defendant Commission and its Members should have given to plaintiff a prompt hearing of its said application "Exhibit 1" hereto, filed on September 13, 1948, for authority to discontinue the operation of its said trains Nos. 11 and 16 and the opportunity of presenting promptly the facts set-out in its said application and should have thereupon rendered its decision promptly on said application. Plaintiff's property has been effectively taken by the long, continued and unreasonable delay on the part of defendant Commission and its Members in hearing and deciding plaintiff's said application. Plaintiff is advised and believes and therefore avers that the failure on the part of the defendant Commission to grant to plaintiff a prompt hearing and a prompt decision of said [fol. 14] application is tantamount to a denial thereof. Plaintiff further avers that defendant Commission and its Members in failing to hear and decide plaintiff's application has required the operation of said two passenger trains Nos. 11 and 16 in the public service, thereby taking plaintiff's property for public use without just compensation, denying to plaintiff due process of law and the equal protection of the law and unduly burdening interstate commerce in violation of the Constitution of the State of Alabama and of the Commerce Clause and the Fifth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff is advised and believes and therefore avers that the refusal by defendant Commission to hear plaintiff's said supplemental petition for authority to keep said two passenger trains Nos. 11 and 16 out of service was likewise a denial to plaintiff of due process of law and of the equal protection of the law under said Constitutional provisions.

Plaintiff further avers that said order of the defendant Commission of December 5, 1949, "Exhibit No. 8" hereto, requiring plaintiff to restore said two passenger trains Nos. 11 and 16 to service, having been made without a lawful



hearing as shown by paragraph 12 hereof, seeks to deprive plaintiff of its property without just compensation and denies to plaintiff due process of law and the equal protection of the law in violation of said Constitutional provisions.

16. Plaintiff further avers that if it restores the operation of said trains Nos. 11 and 16 as required by said order of the defendant Commission of December 5, 1949, it will sustain heavy losses from their operation at the rate of approximately \$9,000.00 per month. The plaintiff would have no means of recovering such losses and they would be irreparable. On the other hand, if the plaintiff fails to restore the operation of said trains Nos. 11 and 16 as required by said order of the defendant Commission of December 5, 1949, the plaintiff and its officers, agents and employees will incur liability for severe penalties and fines under Title 48, Sections 110, 399, 400 and 405 of the Code of Alabama ranging from \$500.00 to \$2,000.00 for each day of such failure to restore said two trains to service.

[fol 15] 17. Plaintiff is informed and believes and therefore avers that if it fails to restore said two passenger trains Nos. 11 and 16 to service as required by said order of the defendant Commission of December 5, 1949 the defendants will under the provisions of the said Title 48 of the Alabama Code immediately undertake the imposition of said severe penalties and fines, thereby subjecting the plaintiff, its officers, agents and employees to a multiplicity of suits on account thereof.

18. Plaintiff has exhausted all administrative remedies available to it and without the protection of the equitable powers of this Court will be remediless.

Wherefore, plaintiff prays:

1. That plaintiff's bill be received, filed and docketed in the records of this court.

2. That process issue requiring defendants and each of them to appear and answer plaintiff's complaint.

3. That a special court of three judges be organized to hear and determine this cause as provided by Title 28, U. S. C. Section 2284.

4. That on a hearing, after at least five days' notice of such hearing shall have been given to Hon. James E. Folsom, Governor, and to defendant, A. A. Carmichael, Attorney General of the State of Alabama, an interlocutory injunction pending the final disposition of the cause be issued enjoining defendants, separately and severally, from proceeding against the plaintiff, its officers, agents or employees to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of plaintiff's or their failure to restore the operation of said two passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi State line as required by said order of defendant Alabama Public Service Commission of December 5, 1949; and that on final hearing such interlocutory injunction be made permanent.

5. That this Court in order to prevent irreparable damage to plaintiff, enter an order without notice temporarily restraining the defendants, jointly and severally, from each [fols. 16-17] and every act against which an interlocutory and permanent injunction is sought as set out in the prayer above numbered 4, on the giving of bond in such amount as the Court may fix, approved and conditioned as required by law.

6. That plaintiff have such other, further and different relief as may be just and equitable, and plaintiff prays for general relief.

(S.) J. T. Stokely, 1038 Brown-Marx Bldg., Birmingham, Alabama; (S.) Charles Clark, Southern Railway Bldg., Washington, D. C., Attorneys for Plaintiff, Southern Railway Company. Benners, Burr, Stokely & McKamy, of Counsel (Birmingham, Ala.). Rushton, Stakely & Johnston, of Counsel (Montgomery, Ala.).

*Duly sworn to by Harold C. Mauney. Jurat omitted in printing.*

[fol. 18]

## EXHIBIT 1 TO COMPLAINT

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

Docket No. —

PETITION OF SOUTHERN RAILWAY COMPANY TO DISCONTINUE  
PASSENGER TRAINS NOS. 11 AND 16 OPERATED BETWEEN  
BIRMINGHAM, ALABAMA, AND COLUMBUS, MISSISSIPPI.

J. T. Stokely, Charles Clark, Attorneys for Petitioner.

Dated: —

The petition of Southern Railway Company respectfully  
shows:

## I

Petitioner is a corporation of the State of Virginia and as such is engaged as a common carrier by rail of persons and property in intrastate commerce between points within the State of Alabama and in interstate commerce between points in the State of Alabama on the one hand and points in many other states on the other hand.

## II

Petitioner as such common carrier operates two passenger trains daily between Birmingham, Ala., and Columbus, Miss., a distance of 122 miles.

Schedule No. 16:	Leave Columbus	6:00 AM
	Leave Fern Bank	6:42 AM
	Arrive Birmingham	10:30 AM
Schedule No. 11:	Leave Birmingham	4:00 PM
	Arrive Fern Bank	7:59 PM
	Arrive Columbus	8:45 PM

## III

Petitioner seeks authority to permanently discontinue the operation of said passenger trains because they are little used by the public and because the cost of operating said trains greatly exceeds the total revenue earned by said trains. Petitioner attaches hereto, as Exhibit A, statement of two sheets showing the operating results of said trains for the twelve-month period March 1947 to February 1948,



inclusive. Said exhibit shows total revenue amounted to \$69,695.25 for hauling passengers, mail and express. The wages paid the train and engine crews, the Federal payroll taxes thereon and the train fuel consumed plus a small live-stock claim alone amounted to \$68,087.09. Other direct expenses incurred in the operation of said trains such as repairs to locomotives, cars, and the like, amounted to \$65,221.40, or total direct expenses of \$133,308.49.

The total direct expense of operating these trains exceeded the total revenues, for the twelve-month period, by [fol. 20] \$63,613.24. The expenses of operation included in the foregoing items are only certain direct expenses and do not include anything for overhead, dispatching, supervision, maintenance of roadway and structures, ticket agents, ticket office expense, and the like. Had those items been included, the loss would have been even greater.

#### IV

The territory between Birmingham, Parrish, Fayette and Columbus, through which said trains operate, is served by improved highways available to the public use in driving private automobiles and trucks, and adequate bus service is maintained over said highways.

#### V

Your petitioner is posting at each station served by said trains Nos. 11 and 16 a notice of the filing of this petition, in the form of Exhibit B hereto, and petitioner will upon the expiration of the required ten-day posting period file with this Commission proof of such posting.

#### VI

The continued operation by your petitioner of Trains Nos. 11 and 16 between Birmingham and Columbus will constitute an undue burden on interstate commerce and [fol. 21] will involve the taking of petitioner's property without due process of law and be a denial to your petitioner of the equal protection of the law contrary to the provisions of the Constitution of the State of Alabama and of the United States.

Wherefore, your petitioner prays for the reasons hereinabove stated, and others to be shown at the hearing, that

it may be duly authorized and permitted in the manner prescribed by law to discontinue the operation of said passenger trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss., in so far as the same are operated in Alabama.

Southern Railway Company, by H. C. Mauney, Its Superintendent. J. T. Stokely (1038 Brown-Marx Bldg., Birmingham, Ala.), Charles Clark (Southern Railway Bldg., Washington, D. C.), Attorneys for Petitioner.

[fol. 22]

## EXHIBIT "A" TO PETITION

Schedule 3—Sheet 1 of 2

Southern Railway Company

Operating Result of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss.

2-146

	March 1947	April 1947	May 1947	June 1947	July 1947	August 1947	September 1947
<b>Revenues:</b>							
Passenger .....	\$3,182.46	\$3,029.11	\$3,309.30	\$4,485.80	\$5,221.87	\$5,646.78	\$4,024.58
Mail .....	1,716.59	1,666.02	1,710.82	1,649.61	1,690.25	1,679.93	1,632.29
Express .....	459.13	478.61	355.40	262.94	208.69	228.90	234.32
Miscellaneous .....	1.24	3.34	2.58	3.50	3.08	2.71	2.20
<b>Total Revenues .....</b>	<b>\$5,359.42</b>	<b>\$5,177.08</b>	<b>\$5,378.10</b>	<b>\$6,401.85</b>	<b>\$7,123.89</b>	<b>\$7,558.32</b>	<b>\$5,893.49</b>
<b>Direct Expenses—"Actual":</b>							
Wages, Train and Engine Crews .....	\$3,091.03	\$3,026.76	\$3,045.87	\$2,986.42	\$3,109.95	\$3,087.65	\$3,040.49
Payroll Taxes, R. R. Ret. & U. I. ....	230.35	232.43	237.66	233.69	233.57	239.41	228.62
Train Fuel .....	2,031.12	2,030.40	2,086.92	2,008.80	2,092.50	2,287.80	2,473.20
Damage to Livestock on Right of Way .....					40.00		
<b>Total Direct Expenses—"Actual" .....</b>	<b>\$5,352.50</b>	<b>\$5,289.59</b>	<b>\$5,370.45</b>	<b>\$5,228.91</b>	<b>\$5,476.02</b>	<b>\$5,614.86</b>	<b>\$5,742.31</b>
<b>Direct Expenses—"Apportioned":</b>							
Enginehouse Expenses .....	\$550.25	\$577.80	\$574.12	\$554.70	\$508.71	\$517.70	\$543.00
Pass. Locos.—Water .....	107.40	103.94	107.40	103.94	107.40	107.40	103.94
Pass. Locos.—Lubricants .....	183.04	177.14	183.04	177.14	183.04	183.04	177.14
Pass. Locos.—Other Supplies .....	99.08	95.90	99.08	95.90	99.08	99.08	95.90
Pass. Locos.—Repairs .....	2,063.27	2,577.38	2,663.28	2,577.38	2,663.28	2,663.28	2,577.38
Pass. Train Cars—C.H.L.W. & Icing .....	329.69	317.99	330.28	319.74	344.34	360.73	353.12
Pass. Train Cars—Lubricants .....	22.90	22.08	22.94	22.20	23.92	25.05	25.42
Pass. Train Cars—Other Expenses .....	18.32	17.67	18.36	17.76	19.12	20.05	19.62
Pass. Train Cars—Repairs .....	679.98	655.86	681.20	659.46	710.18	744.02	728.30
Pass. Train Cars—Air Cond. ....	10.58	10.24	10.58	10.24	10.58	10.58	10.24
Birmingham Terminal Company .....	905.82	760.35	654.50	831.74	844.76	685.17	794.00
<b>Total Direct Expenses—"Apportioned" .....</b>	<b>\$5,570.34</b>	<b>\$5,316.35</b>	<b>\$5,344.78</b>	<b>\$5,370.20</b>	<b>\$5,514.41</b>	<b>\$5,416.10</b>	<b>\$5,427.16</b>
<b>Total Direct Expenses—Actual and Apportioned .....</b>	<b>\$10,922.84</b>	<b>\$10,605.94</b>	<b>\$10,715.33</b>	<b>\$10,599.11</b>	<b>\$10,990.43</b>	<b>\$11,030.96</b>	<b>\$11,169.47</b>
<b>Direct Expenses in Excess of Revenues .....</b>	<b>\$5,563.42</b>	<b>\$5,428.86</b>	<b>\$5,337.13</b>	<b>\$4,197.26</b>	<b>\$3,866.54</b>	<b>\$3,472.64</b>	<b>\$5,275.98</b>



## EXHIBIT "A" TO PETITION—Continued

## Schedule 3—Sheet 2 of 2

## Southern Railway Company

## Operating Result of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss.

18

	October 1947	November 1947	December 1947	January 1948	February 1948	Total 12 Months
<b>Revenues:</b>						
Passenger .....	\$3,653.50	\$3,182.83	\$4,063.92	\$2,822.96	\$2,532.95	\$45,156.06
Mail .....	1,728.14	1,702.12	1,919.24	1,726.98	1,627.33	20,449.32
Express .....	254.98	385.82	465.94	347.37	385.94	4,068.04
Miscellaneous .....	1.16	85	52	44	11	21.83
<b>Total Revenues .....</b>	<b>\$5,637.78</b>	<b>\$5,271.62</b>	<b>\$6,449.62</b>	<b>\$4,897.75</b>	<b>\$4,546.33</b>	<b>\$69,695.25</b>
<b>Direct Expenses—"Actual":</b>						
Wages, Train and Engine Crews .....	\$3,125.30	\$3,242.87	\$3,346.18	\$3,327.84	\$3,150.50	\$37,580.86
Payroll Taxes, R. R. Ret. & U. I. ....	231.63	243.53	244.85	178.25	171.80	2,705.79
Train Fuel .....	2,527.74	2,446.20	2,561.22	2,566.80	2,437.74	27,550.44
Damage to Livestock on Right of Way .....		210.00				250.00
<b>Total Direct Expenses—"Actual" .....</b>	<b>\$5,884.67</b>	<b>\$6,142.60</b>	<b>\$6,152.25</b>	<b>\$6,072.89</b>	<b>\$5,760.04</b>	<b>\$68,087.09</b>
<b>Direct Expenses—"Apportioned":</b>						
Enginehouse Expenses .....	\$488.87	\$488.10	\$526.07	\$535.99	\$495.32	\$6,360.63
Pass. Locos.—Water .....	107.40	103.94	107.40	107.40	100.48	1,268.04
Pass. Locos.—Lubricants .....	183.04	177.14	183.04	183.04	171.24	2,161.08
Pass. Locos.—Other Supplies .....	99.08	95.90	99.08	99.08	92.70	1,169.86
Pass. Locos.—Repairs .....	2,663.28	2,577.38	2,663.28	2,663.28	2,491.46	31,443.94
Pass. Train Cars—C.H.L.W. & Icing .....	353.71	365.41	391.76	339.06	309.20	4,115.03
Pass. Train Cars—Lubricants .....	24.56	25.38	27.20	23.54	21.48	285.77
Pass. Train Cars—Other Expenses .....	19.65	20.30	21.76	18.84	17.18	228.63
Pass. Train Cars—Repairs .....	729.52	753.67	808.02	699.32	637.72	8,487.25
Pass. Train Cars—Air Cond. ....	10.58	10.24	10.58	10.58	9.90	124.92
Birmingham Terminal Company .....	826.18	813.28	871.93	810.60	777.92	9,576.25
<b>Total Direct Expenses—"Apportioned" .....</b>	<b>\$5,505.87</b>	<b>\$5,430.74</b>	<b>\$5,710.12</b>	<b>\$5,490.73</b>	<b>\$5,124.60</b>	<b>\$65,221.40</b>
<b>Total Direct Expenses—Actual and Apportioned .....</b>	<b>\$11,390.54</b>	<b>\$11,573.34</b>	<b>\$11,862.37</b>	<b>\$11,563.62</b>	<b>\$10,884.64</b>	<b>\$133,308.49</b>
<b>Direct Expenses in Excess of Revenues .....</b>	<b>\$5,752.76</b>	<b>\$6,301.72</b>	<b>\$5,412.75</b>	<b>\$6,665.87</b>	<b>\$6,338.31</b>	<b>\$63,613.24</b>



[fol:23]

## EXHIBIT 2 TO COMPLAINT

(Copy)

## Title 49—Transportation and Railroads

## Chapter I—Interstate Commerce Commission

## Subchapter A—General Rules and Regulations

## Part 95—Car Service

## Service Order No. 843

Restrictions on Coal-Burning Passenger Service Locomotive  
Mileage

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 21st day of October, A. D. 1949.

*It appearing*, That reserve stocks of railroad locomotive fuel coal have decreased; that some such reserves have reached a dangerously low level and are further decreasing; that the supply and movement of cars and trains and "car service" generally is impeded and interrupted by the lack of locomotive fuel coal; that the present production of bituminous coal is insufficient to relieve these conditions and adequately supply such fuel, and the Commission being of the opinion that an emergency exists requiring immediate action in all sections of the country;

*It is ordered, That:*

§ 95.843 *Restrictions on coal-burning passenger service locomotive mileage.*

(a) *Reduction in passenger locomotive mileage.* On and after the effective date of this order, any common carrier by railroad operating coal-burning steam locomotives and having 25 or less days supply of fuel coal for such locomotives and not having available a dependable source of supply of coal, shall reduce its coal-burning passenger locomotives miles to an amount of 25% less than it operated such coal-burning passenger locomotives on October 1, 1949.

(b) *Application.* (1) The provisions of this order shall apply to intrastate commerce, as well as interstate and foreign commerce.



(2) The provisions of this order shall apply to coal-burning passenger locomotive operation commencing on and after the effective date hereof.

(c) *Effective date.* This order shall become effective at 11:59 p.m., October 25, 1949.

(d) *Expiration date.* This order shall continue in effect until 11:59 p. m., December 25, 1949, unless otherwise modified, changed, suspended or annulled by order of the Commission.

(e) *Rules, regulations and practices suspended.* The operation of all rules, regulations, and practices insofar as they conflict with the provisions of this order, is hereby suspended.

*It is further ordered,* That a copy of this order shall be served upon the State railroad regulatory bodies of each state, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U.S.C. 1 (10)-(15).

By the Commission, division 3.

W. P. Bartel, Secretary. (Seal.)

[fol. 24]

## EXHIBIT 3 TO COMPLAINT

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

Docket No. —

Supplemental Petition of Southern Railway Company Concerning Interstate Passenger Trains Nos. 11 and 16 Formerly Operated Between Birmingham, Alabama and Columbus, Mississippi, Now Discontinued Under Order of the Interstate Commerce Commission

J. T. Stokely, Charles Clark, Attorneys for Petitioner.  
Dated: November 9, 1949.

To the Honorable Alabama Public Service Commission.

Comes Southern Railway Company and files this petition supplemental to its original petition herein filed on September 13, 1948 and respectfully shows:

## I

Petitioner filed as Exhibit "A" to its original petition herein a statement showing the operating results of its said trains Nos. 11 and 16 for the twelve-month period ending February 29, 1948. The heavy losses of \$63,313.24 there shown have not only since continued but have progressively grown heavier and more unbearable.

The statement marked Exhibit "C" attached hereto shows the operating results of said two interstate trains for the twelve-month period immediately following the twelve-month period covered by Exhibit "A", that is, from March 1, 1948 to February 28, 1949, inclusive. Said Exhibit "C" shows total revenue amounted to \$52,720.20 for hauling [fol. 25] passengers, mail and express. The wages paid the train and engine crews, the Federal payroll taxes thereon and the train fuel consumed plus personal injury and property damage claims and suits alone amounted to \$80,559.65. Other direct expenses incurred in the operation of said trains such as repairs to locomotives, cars, and the like, amounted to \$52,716.33, or total direct expenses of \$133,275.98. The total direct expense of operating these trains exceeded the total revenues for the twelve-month period, by \$80,555.78.

Petitioner attaches hereto as Exhibit "D" a statement showing the operating results of said trains for the seven-month period, March 1, 1949 to September 30, 1949, inclusive, immediately following the twelve-month period covered by Exhibit "C". Said Exhibit "D" shows total revenue amounted to \$29,971.96 for hauling passengers, mail and express. The wages paid the train and engine crews, the Federal payroll taxes thereon and the train fuel consumed plus personal injury and property damage claims and suits alone amounted to \$54,894.08. Other direct expenses incurred in the operation of said trains such as repairs to locomotives, cars, and the like, amounted to \$38,418.56, or total direct expenses of \$93,312.64. The total direct expense of operating these trains exceeded the total revenues, for the seven-month period, by \$63,340.68.

## II

The operation of said interstate trains Nos. 11 and 16 was [fol. 26] discontinued on October 26, 1949, under an order issued by the Interstate Commerce Commission on account of the shortage of coal brought about by the current strike in the bituminous coal fields east of the Mississippi River including Alabama by the United Mine Workers of America, resulting in the closing down of all, or substantially all of the coal mines in said fields. The little use of said two interstate trains by the public and the heavy losses in their operation before they were discontinued on October 26, 1949 do not justify the resumption of their operation after said order of the Interstate Commerce Commission shall have expired according to its terms at 11:59 P. M. December 25, 1949, or shall have in the meantime been modified, changed, suspended or annulled, and the shortage of coal shall have been relieved.

## III

The requirement by the Commission of the resumption of operation by your petitioner of said interstate passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi would constitute an undue burden on interstate commerce and would involve the taking of petitioner's property without due process of law and be a denial to your petitioner of the equal protection of the law.



contrary to the provisions of both the Constitution of the State of Alabama and of the United States.

Wherefore, your petitioner prays for the reasons herein-  
[fol. 27] above stated, and others to be shown at the hearing, that it not be required to restore the operation of said two interstate passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi when the coal shortage shall have been relieved and that it be duly authorized by the Commission not to restore the operation of said trains insofar as the same are operated in the state of Alabama.

Southern Railway Company, by H. C. Mauney, Its  
Superintendent.

[fol. 28]

## EXHIBIT "C" TO SUPPLEMENTAL PETITION

## Southern Railway Company

Operating Results of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., and Columbus, Miss., for the period from March 1, 1948, to February 28, 1949, Inclusive

	Total 12 Months		
	Train No. 11	Train No. 16	Total
<b>Revenues</b>			
Passenger .....	\$15,326.26	\$14,619.17	\$29,945.43
Mail .....	11,827.30	7,604.24	19,431.54
Express .....	1,320.52	1,969.13	3,289.65
Milk & Newspapers .....	20.37	33.21	53.58
<b>Total</b> .....	<b>\$28,494.45</b>	<b>\$24,225.75</b>	<b>\$52,720.20</b>
<b>Direct Expenses—"Actual"</b>			
Wages, Train and Engine Crews .....	\$17,819.26	\$17,819.28	\$35,638.54
Payroll Tax—R.R. Retirement & Unemp. Ins. ....	1,009.83	1,009.79	2,019.62
Train Fuel .....	10,869.48	10,869.50	21,738.98
Injuries to Persons .....	21,112.51		21,112.51
Damage to Property .....		50.00	50.00
<b>Total Direct Expenses—"Actual"</b> .....	<b>\$50,811.08</b>	<b>\$29,748.57</b>	<b>\$80,559.65</b>
<b>Direct Expenses—"Apportioned"</b>			
Enginehouse Expenses .....	\$1,895.62	\$1,895.61	\$3,791.23
Pass. Locomotives—Water .....	345.76	345.07	690.83
Pass. Locomotives—Lubricants .....	588.94	587.78	1,176.72
Pass. Locomotives—Other Supplies .....	304.41	303.87	608.28
Pass. Locomotives—Repairs Steam .....	10,162.12	10,144.85	20,306.97
Pass. Train Cars—C. H. L. W. & Icing .....	1,627.29	1,626.73	3,254.02
Pass. Train Cars—Lubricants .....	374.66	374.61	749.27
Pass. Train Cars—Other Expenses .....	110.24	110.20	220.44
Pass. Train Cars—Repairs .....	2,260.44	2,259.29	4,519.73
Pass. Train Cars—Air Conditioning .....	177.14	177.36	354.50
Pass. Train Cars—Repairs to Motor Car and Trailer .....	3,945.79	3,945.78	7,891.57
Rent Paid for Equipment .....	2.80		2.80
Terminal Station Expenses—Birmingham, Ala. ....	4,541.25	4,608.72	9,149.97
<b>Total Direct Expenses—"Apportioned"</b> .....	<b>\$26,336.46</b>	<b>\$26,379.87</b>	<b>\$52,716.33</b>
<b>Total Direct Expenses "Actual" &amp; "Apportioned"</b> .....	<b>\$77,147.54</b>	<b>\$56,128.44</b>	<b>\$133,275.98</b>
<b>Direct Expenses in Excess of Revenues</b> .....	<b>\$48,653.09</b>	<b>\$31,902.69</b>	<b>\$80,555.78</b>

Trains did not operate March 21 to April 24, 1948, account O. D. T. Order No. 69.

[fol. 29]

## EXHIBIT "D" TO SUPPLEMENTAL PETITION

## Southern Railway Company

Operating Results of Passenger Trains Nos. 11 and 16 between Birmingham, Ala., to Columbus, Miss. for the period from March 1, 1949 to September 30, 1949

	Total 8 Months		
	Train No. 11	Train No. 16	Total
<b>Revenues</b>			
Passenger.....	\$8,557.79	\$7,648.03	\$16,205.82
Mail.....	6,906.32	4,930.70	11,837.02
Express.....	1,773.89	1,110.00	1,883.89
Milk and Newspapers.....	34.77	10.46	45.23
<b>Total.....</b>	<b>\$16,272.77</b>	<b>\$13,699.19</b>	<b>\$29,971.96</b>
<b>Direct Expenses—"Actual"</b>			
Wages, Train and Engine Crews.....	\$12,421.35	\$12,421.33	\$24,842.68
Payroll Tax—R. R. Retirement & Unemp. Ins. ....	687.13	687.16	1,374.29
Train Fuel.....	7,944.72	7,941.54	15,886.26
Injuries to Persons.....	12,785.85		12,785.85
Damage to Property.....	5.00		5.00
<b>Total Direct Expenses—"Actual".....</b>	<b>\$33,844.05</b>	<b>\$21,050.03</b>	<b>\$54,894.08</b>
<b>Direct Expenses—"Apportioned"</b>			
Enginehouse Expenses.....	\$1,773.70	\$1,773.71	\$3,547.41
Pass. Locomotives—Water.....	332.70	333.45	666.15
Pass. Locomotives—Lubricants.....	565.99	567.28	1,133.27
Pass. Locomotives—Other Supplies.....	261.69	262.28	523.97
Pass. Locomotives—Repairs—Steam.....	8,546.92	8,514.90	17,061.82
Pass. Train Cars—C. H. L. W. & Iceing.....	1,053.47	1,055.00	2,108.47
Pass. Train Cars—Lubricants.....	96.44	96.37	192.81
Pass. Train Cars—Other Expenses.....	100.83	100.80	201.63
Pass. Train Cars—Repairs.....	2,134.51	2,142.11	4,276.62
Pass. Train Cars—Air Conditioning.....	282.69	279.32	562.01
Pass. Train Cars—Repairs to Motor Car and Trailer.....	1,344.65	1,334.03	2,678.68
Terminal Station Expenses—Birmingham, Ala. ....	2,732.86	2,732.86	5,465.72
<b>Total Direct Expenses—"Apportioned".....</b>	<b>\$19,226.45</b>	<b>\$19,192.11</b>	<b>\$38,418.56</b>
<b>Total Direct Expenses "Actual" &amp; "Apportioned".....</b>	<b>\$53,070.50</b>	<b>\$40,242.14</b>	<b>\$93,312.64</b>
<b>Direct Expenses in Excess of Revenues.....</b>	<b>\$36,797.73</b>	<b>\$26,542.95</b>	<b>\$63,340.68</b>



[fol. 30]

## EXHIBIT 4 TO COMPLAINT

Copy

STATE OF ALABAMA, ALABAMA PUBLIC SERVICE COMMISSION,  
MONTGOMERY 1, ALABAMA

October 26, 1949.

Lamar Wiley, Secretary.

Gordon Persons, President; Jimmy Hitchcock, Associate  
Commissioner; C. C. (Jack) Owen, Associate Commis-  
sioner.

To All Railroads:

Re: I. C. C. Order 843

This Commission is receiving telegrams and letters  
notifying us as to compliance with the above order, same  
being in connection with the discontinuance of passenger  
trains.

The Public Service Commission is expecting that each  
and every train which might have been removed in com-  
pliance with the I. C. C. order will be restored to service  
within 24 hours after the I. C. C. order might be rescinded.

Very truly yours, (S.) Gordon Persons, President.

[fol. 31]

## EXHIBIT 5 TO COMPLAINT

Title 49—Transportation and Railroads  
Chapter I—Interstate Commerce Commission  
Subchapter A—General Rules and Regulations

Part 95—Car Service

Service Order No. 843-A

(Vacates Service Order No. 843)

Restrictions on Coal-Burning Passenger Service Locomo-  
tive Mileage

At a Session of the Interstate Commerce Commission,  
Division 3, held at its office in Washington, D. C., on the  
14th day of November, A. D. 1949.

Upon further consideration of Service Order No. 843 (14 F. R. 6517) and good cause appearing therefor:

*It is ordered, That:*

§ 95.843 Service Order No. 843, *Restrictions on Coal-burning Passenger Service Locomotive Mileage*, be and it is hereby, vacated and set aside.

*It is further ordered, That* this order shall become effective at 11:59 p. m., November 20, 1949; that a copy of this order and direction be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U. S. C. 1 (10)-(17) ).

By the Commission, division 3.

W. P. Bartel, Secretary, (Seal).

[fol. 32]

November 15, 1949

638-2-843

Supplement No. 1 to Circular CSD-434

To All Railroads:

Herewith I. C. C. Service Order No. 843-A which vacates and sets aside Service Order No. 843, effective 11:59 P. M., November 20, 1949.

Service Order 843, effective October 25, 1949, required any common carrier by railroad operating coal-burning steam locomotives and having 25 or less days supply of fuel coal, and not having available a dependable source of supply of coal, to reduce its coal-burning passenger locomotive miles 25 per cent under the mileage operated on October 1, 1949.

Yours very truly, A. H. Gass.

Lists: CS1, 1A, 1B, DM, CSA.

[fol. 33]

## EXHIBIT 6 TO COMPLAINT

Copy

RA771 NSA547 NS.MYA758 Long PD—Montgomery,  
Ala. 21 51OP—1949 Nov. 21 P.M. 6:56

R. K. McClain, Asst Vice Pres.

Report Dly Southern Railway System Wash., D. C.  
on October 23, 1949 you wired us as follows:

"In compliance with Service Order No. 843, entitled Restrictions on Coal-burning Passenger Service Locomotive Mileage—entered by Division 3 of Interstate Commerce Commission on October 21st, and served upon Railroads and Regulatory Commissions, to meet the present coal shortage emergency, Southern Railway System Lines will, effective 11:59 P. M., October 25th discontinue operation of the following passenger trains: 1-2 Sheffield-Parrish, 7-8 Sheffield-Chattanooga, 15-16 Wilton-Selma 11-16 Birmingham-Columbus. (Signed) R. K. McClain, Assistant Vice-President, Southern Railway System".

On October 26 you were advised "The Public Service Commission is expecting that each and every train which might have been removed in compliance with the ICC order will be restored to service within 24 hours after the ICC order might be rescinded."

On November 17th we wired you as follows: "Please advise this Commission by return wire if your railroad will definitely restore all passenger trains which were removed in accordance with the emergency order of interstate Commerce Commission in connection with recent coal strike. We have previously notified you that this Commission expects all discontinued trains to be fully restored and [fol. 34] in normal operation 24 hours after the lifting of the ICC order which takes effect midnight November 20."

On November 18th you wired us as follows: "Operation Trains 1-2 Sheffield-Parrish, 7-8 Sheffield Chattanooga and 15-16 Wilton-Selma, suspended under ICC order 483, will be restored November 21st. (Signed) R. K. McClain, Assistant vice President Southern Railway System."

It is noted in your telegram of November 18th that no reference is made to the contemplated restoration of service



of trains 11 and 16 between Birmingham and Alabama-Mississippi-state line.

Will you please, therefore, wire us at once if the Southern Railway intends to immediately restore these two trains and if not, kindly supply us with your authority for failing to restore them.

Alabama Public Service Commission by Gordon  
Persons, President.

[fol. 35]

EXHIBIT "6"

Copy

Western Union

Day Letter

Washington, Nov. 22, 1949.

Alabama Public Service Commission  
Honorable Gordon Persons, President  
Montgomery, Alabama.

Your wire received stop As you see we restored to service yesterday all of the eight trains discontinued under ICC service order 843 with the exception of trains Nos. 11 and 16 between Birmingham and Columbus Mississippi stop As your records will show we have had pending with you since November 10 a supplemental petition asking your authority to keep said two trains out of service stop We requested that the supplemental petition be set down for hearing while the ICC service order which was lifted at midnight on the twentieth was still in effect but you have set it down for hearing along with the original petition for December 8 stop The management is advised that if it restores the trains to service it will thereby waive its supplemental petition which under all the circumstances it cannot see its way clear to do particularly as the direct expenses alone of the operation of these two trains for the last 7 full months of operation exceeded the revenues which they earned by more than nine thousand dollars per month as shown by the supplemental petition. This is an unnecessary and wasteful burden which we should not in all good conscience be asked to resume stop With these two trains

off the company has in service daily between Birmingham and Columbus mixed trains numbers 15 and 12 carrying a standard seventy foot passenger car partitioned for white and colored passengers with separate toilets for men and women in each end of the car and also a standard combination mail express and baggage car with a railroad post office in charge of a RPO clerk in one end of it the rest of the car being used for storage mail express and baggage if any with an express messenger in charge stop The trains operate on convenient schedules stop Number 15 leaves Birmingham at seven fifteen A M arriving Columbus Mississippi at one fifteen P M stop Number 12 leaves Columbus Mississippi one thirty P M arriving Birmingham Alabama seven thirty P M stop These trains run well on time make all stops do very little switching and coupled with improved paralleling highway facilities for buses and private automobiles render adequate service we think to the territory served between Birmingham and Columbus stop With all due regard for the Commission it is not our intention to restore the operation of trains 11 and 16 until we are afforded a hearing and decision on our supplemental petition for authority to keep them out of service stop Please be assured that our position is in no sense arbitrary or [fol. 36] defiant but is we believe the only sound one we can properly take stop We hope on further consideration the Commission will see the correctness of our position and refrain from issuing a citation against us until we can have a hearing and a decision in orderly course on our supplemental petition stop We feel deeply that we are entitled to the sympathetic cooperation of the Commission in our effort to avoid the dissipation of our resources in the operation of local passenger trains at such tremendous and intolerable losses stop

Southern Railway Company, R. K. McClain, Assistant Vice President.

[fol. 37]

## EXHIBIT 7 TO COMPLAINT

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

Gordon Persons, President      Lamar Wiley, Secretary  
Jimmy Hitchcock, Associate Commissioner  
C. C. (Jack) Owen, Associate Commissioner.

Southern Railway Company, a corporation, Respondent

Citation: to respondent, Southern Railway Company, a corporation, to show cause, if any, why the Commission should not enter of record an order specifying that the failure or refusal of respondent to restore on and after November 22, 1949, the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi state line, constitutes a violation of the provisions of Title 48 of the Code of Alabama of 1940, and requiring that such violation be discontinued by restoration by respondent of the operations of said trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

Docket 12225

On and prior to October 25, 1949, Southern Railway Company, respondent in this proceeding, operated, under regular schedules, its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi.

Under and by authority of the provisions of Service Order No. 843, dated October 21, 1949, of the Interstate Commerce Commission, which Service Order became effective at 11:59 p. m. on October 25, 1949, the respondent, Southern Railway Company, suspended the operation of the aforesaid two trains between the said points.

Thereafter, the Interstate Commerce Commission by its order terminated or suspended the effective period of its aforesaid Service Order No. 843, and said Service Order No. 843 is not now in effect.



It appears to the Commission that upon the termination or suspension of the effective period of said Service Order No. 843 it was, is and will be the legal duty of respondent under the provisions of Title 48 of the Code of Alabama of 1940 to restore and resume the operation of such two trains between Birmingham, Alabama, and the Alabama-Mississippi state line, and the respondent was advised by the Commission prior to the termination of the effective period of said Service Order No. 843, that respondent should restore such service not later than 24 hours after the termination or suspension of the effective period of said Service Order No. 843.

The Commission is informed that respondent has not restored and resumed the operation of said passenger trains between Birmingham, Alabama, and the Alabama-Mississippi state line within the said specified period of 24 hours after the termination or suspension of the effective period of said Service Order No. 843, and the Commission is further informed by respondent, through its authorized attorney and representative, that respondent does not intend to restore and resume operation of said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

Now, Therefore, the premises considered,

It Is Ordered by the Commission that respondent, Southern Railway Company, a corporation, by and through its authorized agent or agents, officer or officers, or employee or employees, be and appear before the Commission at its offices in Montgomery, Alabama, at 2:00 p. m., on Friday, November 25, 1949, then and there to show cause, if any, [fol. 38] why this Commission should not enter of record an Order specifying that the failure or refusal of respondent, Southern Railway Company, a corporation, to restore and resume on and after November 22, 1949, the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi state line; constitutes a violation of the provisions of Title 48 of the Code of Alabama of 1940, and requiring that such violation be discontinued by restoration by respondent of the operations of said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

Done at the offices of the Commission in Montgomery, Alabama, on this the 22nd day of November, 1949.

Alabama Public Service Commission. (S.) Gordon Persons, President; Jimmy Hitchcock, Associate Commissioner; C. C. (Jack) Owen, Associate Commissioner.

Attest: A True Copy. (S.) Lamar Wiley, Secretary.

[fol. 39]

EXHIBIT 8 TO COMPLAINT

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

Gordon Persons, President.

Jimmy Hitchcock, Associate Commissioner.

C. C. (Jack) Owen, Associate Commissioner.

Lamar Wiley, Secretary.

SOUTHERN RAILWAY COMPANY, a Corporation, Respondent

Docket No. 12225

Order of the Commission

On November 22, 1949, the Commission issued its citation order to Respondent Southern Railway Company, a corporation, to appear before the Commission at its offices in Montgomery, Alabama, at 2:00 P. M., on Friday, November 25, 1949, then and there to show cause, if any there be, why this Commission should not enter of record an order specifying that the failure or refusal of respondent Southern Railway Company, a corporation, to restore and resume on and after November 22, 1949, the operation of its passenger Trains Nos. 11 and 16 between Birmingham, Alabama, and the Alabama Mississippi state line constitutes a violation of the provisions of Title 48 of the Code of Alabama 1940, and requiring that such violation be discontinued by restoration by the respondent of the operation of said two trains between Birmingham, Alabama and the Alabama-Mississippi State Line.

Pursuant to said citation the respondent Southern Railway Company, a corporation, appeared at the time and place ordered and upon the hearing the following facts were established without conflict:

On and prior to October 25, 1949, the Southern Railway Company operated on a regular schedule its passenger Trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi. On September 13, 1948 the Southern Railway Company had filed with this Commission its petition for authority to discontinue its said two passenger Trains Nos. 11 and 16 operating between Birmingham, Alabama and Columbus, Mississippi. On November 14, 1949, Southern Railway Company filed with this Commission a petition supplemental to its said original petition filed on September 13, 1948. On November 16, 1949, this Commission set for hearing in Fayette, Alabama, commencing on December 8, 1949, both said original petition for authority to discontinue said passenger trains and said supplemental petition for authority to not restore the operation of said two passenger trains. Such hearing has not been held and no official order has been entered by this Commission on the said original petition or said supplemental petition. Nor has this Commission entered any order allowing the [fol. 40] discontinuance of the said passenger trains.

Purporting to act under the authority of an order of the Interstate Commerce Commission, being Service Order No. 843, dated October 21, 1949; and effective at 11:59 P. M. on October 25, 1949, the respondent Southern Railway Company suspended operation of the aforesaid two trains between the said points on the effective date of said order.

The Interstate Commerce Commission by its Order No. 843 A, effective as of 11:59 P. M. November 20, 1949, terminated the effective operation of its Service Order No. 843, and since the effective date of Order No. 843 A, said Service Order No. 843 has not been in effect.

Prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, this Commission had notified the respondent Southern Railway Company, along with every other railroad company operating in the State of Alabama, that each and every train which might have been removed under the authority of said Service Order No. 843 should be restored to service within twenty-four (24) hours after said order



might be terminated, such notice having been mailed on October 26, 1949 "to all railroads." Also, prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, as has already been recited, this Commission had on November 16, 1949, ordered a public hearing of the original petition of Southern Railway Company for authority to discontinue its said two passenger trains and of its supplemental petition for authority to not restore the operation of said two trains, and notice of said hearing had been issued to Southern Railway Company and to all interested parties, said petitions being set for hearing in Fayette, Alabama, at the Fayette County Court House, commencing at 9:00 A. M. on Thursday, December 8, 1949, said petitions and all proceedings thereon being shown under Docket No. 12221 of this Commission.

The records of the Commission show that every other railroad company operating in Alabama promptly reinstated every other train removed under the authority of the said Order of the Interstate Commerce Commission. This Commission is of the opinion that within twenty-four hours after the said Order No. 843 of the Interstate Commerce Commission was terminated by Order No. 843 A of the said Interstate Commerce Commission, i.e., within twenty-four hours after 11:59 P. M. on November 20, 1949, the operation of passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line should have been restored. Nevertheless, the respondent Southern Railway Company has not restored and resumed the operation of said two passenger trains between Birmingham, Alabama, and the Alabama-Mississippi state line, and the Commission is informed by the respondent that it does not intend to restore and resume the operation of said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line. Since 12:01 A. M. November 22, 1949, the discontinuance of the operation of said two passenger trains has been without the authority [fol. 41] of this Commission or of the Interstate Commerce Commission and without legal authority of any kind, and in defiance of the direction of this Commission.

It is clearly provided by the statutes of this State (Code of Alabama 1940, Title 48, Section 106; see also Section 35) that "No transportation company \* \* \* shall aban-

don all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public • • • unless and until there shall first have been filed an application for a permit to abandon the service and obtained from the Commission a permit allowing such abandonment." It is obvious that the respondent Southern Railway Company has taken the law into its own hands and is acting in violation of the statutes of Alabama and in defiance of this Commission's authority.

Now, therefore, the premises considered, it is ordered by the Commission that it is hereby found and specified, that the failure or refusal of the respondent Southern Railway Company, a corporation, to restore and resume on and after 12:01 A. M., November 22, 1949, the operation of its passenger Trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line, constitutes a violation of the provisions of Title 48 of the Code of Alabama 1940.

It is further ordered by the Commission that the respondent Southern Railway Company shall immediately discontinue the violation of said law by restoring the operation of its said two trains between Birmingham, Alabama and the Alabama-Mississippi state line.

It is further ordered by the Commission that the attention of the respondent Southern Railway Company be directed to Section 399 of Title 48 of the 1940 Code of Alabama, which provides in part that any utility doing business in this State which knowingly or willfully violates any lawful order of this Commission shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$1,000.00 for each offense, and that in the case of a violation of this Commission's orders each day's violation shall be deemed to be a separate offense.

It is further ordered that the attention of the respondent Southern Railway Company be directed to its petitions before this Commission under Docket 12221 and to the setting of said petitions for hearing at Fayette, Alabama commencing at 9:00 A. M. on Thursday, December 8, 1949, and to the further fact that unless the said respondent Southern Railway Company purges itself of its aforesaid contempt of this Commission on or before the time set for the commencement of such hearing, it will be optional with

this Commission to proceed with said hearing or to postpone the same until the said respondent Southern Railway Company shall have purged itself of its aforesaid contempt [fol. 42] of this Commission's orders and authority in the premises.

Done at the offices of the Commission in Montgomery, Alabama on this the 5th day of December, 1949.

Alabama Public Service Commission. (S.) Gordon Persons, President. Jimmy Hitchcock, Associate Commissioner. C. C. (Jack) Owen, Associate Commissioner.

Attest: A True Copy. (S.) Lamar Wiley, Secretary.

[fol. 43]

# EXHIBIT 9 TO COMPLAINT

## Table 3B

### Birmingham and Columbus

#### (Birmingham Division)

Read Down			Miles	Central Time		Read Up	
15	11					16	12
A.M.	P.M.					A.M.	P.M.
*7 15	4 00	0	Lv Birmingham	Ala. Ar		10 30	*7 30
7 30	4 10	2.2	N. Birmingham	"		10 15	7 15
f7 48	f4 26	8.3	Coalburg	"		f10 02	f6 49
f8 04	f4 40	13.2	Brookside	"		f9 49	f6 36
f8 10	f4 45	14.7	Jefferson	"		f9 44	f6 31
f8 25	f4 57	20.2	Littleton	"		f9 33	f6 16
f8 40	f5 12	26.4	Burnwell	"		f9 21	f5 57
9 03	5 32	34.0	Cordova	"		9 03	5 32
f9 15	f5 40	38.5	America Jct.	"		f8 55	f5 20
9 30	5 45	40.6	Parrish	"		8 50	5 05
f9 50	f6 04	47.3	Oakman	"		f8 24	f4 44
f10 10	f6 17	53.5	Corona	"		f8 13	f4 30
f10 38	f6 40	63.9	Berry	"		f7 53	f4 05
f10 50	f6 50	69.1	Bankston	"		f7 45	f3 52
f11 16	7 08	79.7	Fayette	"		7 25	3 20
f11 35	f7 23	83.6	Covin	"		f7 14	f3 09
f11 57	f7 39	93.0	Kennedy	"		f7 00	f2 48
f12 10	f7 50	98.9	Millport	"		f6 50	f2 34
f12 20	f7 59	103.0	Fernbank	"		f6 42	f2 25
f12 43	f8 17	113.1	Steens	Miss.		f6 23	f2 04
*1 15	8 45	122.1	Ar Columbus	" Lv		6 00	*1 30
P.M.	P.M.					A.M.	P.M.

Republic, Bivens, Cardiff, Lynn Crossing, Bibby, Bryan, Doliska, Red Star, Barney, Big Ridge, Gayosa, Dixie Spring, Marietta, Alta, Patton, Rossland City, Stough, Belk and Melbourne are flag stops for Nos. 11, 12, 15 and 16.  
f—Flag stop. \*—Mixed trains.



[fol. 44]

## EXHIBIT 10 TO COMPLAINT

Alabama Public Service Commission

Docket No. ....

Witness: George V. Bayliss,

Exhibit No. ....

Comparison of Motor Vehicle Registrations in the Counties of Jefferson, Walker, Fayette and Lamar and State of Alabama for the License Years 1939 and 1948

Authority: Department of Revenue, State of Alabama, Montgomery, Alabama

## Jefferson County

	Pass. Autos.	Trucks	Buses
1948 .....	65,822	15,706	669
1939 .....	51,263	8,164	169
Increase .....	14,559	7,542	500
Percent .....	28.4%	92.3%	295.8%

## Walker County

	Pass. Autos.	Trucks	Buses
1948 .....	7,058	2,872	38
1939 .....	4,850	1,050	14
Increase .....	2,208	1,822	24
Percent .....	45.5%	183.0%	171.4%

## Fayette County

	Pass. Autos.	Trucks	Buses
1948 .....	2,281	1,035	3
1939 .....	1,566	500	0
Increase .....	715	535	3
Percent .....	45%	107%	300%

[fol. 45]

## Lamar County

	Pass. Autos.	Trucks	Buses
1948 .....	1,570	723	0
1939 .....	1,268	396	0
Increase .....	302	327	0
Percent .....	23.8%	82.5%	0

## State of Alabama

	Pass. Autos.	Trucks	Buses
1948 .....	361,597	124,931	2,101
1939 .....	250,261	54,947	511
Increase .....	111,336	69,984	1,590
Percent .....	44.4%	127.3%	311%

[fol. 46]

## EXHIBIT 11 TO COMPLAINT

Alabama Public Service Commission

Docket No. ....

Witness: George V. Bayliss

Exhibit No. ....

Ratio of Persons Eighteen Years of Age and Over Per Registered Automobile  
in the State of Alabama, by Five-year Periods, 1910-1945, Inclusive

Authority: Highway Statistics, Summary to 1945, Public Roads Administration,  
U. S. Department of Commerce, Washington, D. C.

State of Alabama

Ratio of Persons  
18 Yrs. of Age and Over  
Per Registered Automobile

Year	
1910	663.5
1915	119.1
1920	20.8
1925	8.2
1930	6.4
1935	7.9
1940	6.4
1945	6.0

[fol. 47] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

## SUMMONS

You are hereby summoned and required to serve upon J. T. Stokely, plaintiff's attorney, whose address is 1038 Brown Marx Building, Birmingham, Alabama, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated Dec. 6, 1949.

O. D. Street, Jr., Clerk of the Court. (Seal)

[fol. 48] Received this writ at Montgomery, Alabama on December 6, 1949. Executed by serving copies thereof with complaints attached on the following:

A. A. Carmichael, Attorney General of the State of Alabama at 5:05 P. M. State Judicial Building, Montgomery, Alabama, December 6, 1949.

Alabama Public Service Commission by leaving copies with Gordon Persons, its president at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M., December 7, 1949.

Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Av., Montgomery, Alabama at 8:00 A. M., December 7, 1949.

Jimmy Hitchcock, Associate Commissioner by leaving copies with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

C. C. (Jack) Owen, Associate Commissioner by leaving copies with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

Benjamin F. Ellis, United States Marshal, Middle District of Alabama, by Jack S. Johnson, Deputy.

Fees \$10.00.

Returned and Filed Dec. 8, 1949. O. D. Street, Jr., Clerk.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed December 6, 1949

This cause came on to be heard on the verified complaint herein, and it appearing to the court that defendants are about to commit the acts hereinafter referred to and that they will do so unless restrained by order of this court, and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be served and a hearing had on plaintiff's application for a temporary restraining order, in that if plaintiff fails to restore the operation of said trains, Nos. 11 and 16, as required by said order of the defendant commission dated December 5, 1949, described in the complaint, and made "Exhibit No. 8" thereto the plaintiff will be liable to the severe penalties provided by Title 48 of the Alabama Code, particularly Sections 110, 399, 400 and 405 thereof, which involve penalties or fines ranging from \$500 to \$2000 per day against plaintiff, for each day said trains Nos. 11 and 16



are not operated. Each of plaintiff's officers, agents and employees concerned will also be subject to arrest and fines up to \$1000 per day. If plaintiff restores the operation of said trains Nos. 11 and 16 as required by said order, it will be subject to an operating loss of approximately \$300 per day. Such loss would be irreparable as plaintiff would have no means of recovery. The liability for said penalties and fines, if the operation of said trains are not restored, would likewise be irreparable, because when paid they would be impossible of recovery.

It Is Ordered, that defendants, Alabama Public Service Commission, Gordon Persons, its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the [fol. 50] State of Alabama, their agents, servants, employees and attorneys and all persons in active concert and participation with them be, and they are hereby restrained from pursuing or invoking any of the remedies provided in Title 48 of the 1940 Code of Alabama, particularly Sections 110, 399, 400 and 405, or otherwise, for the purpose of compelling the plaintiff, or its officials to restore and operate its said trains, Nos. 11 and 16, between Birmingham, Alabama and the Mississippi State Line, or as punishment for their failure to restore and operate said trains; provided that plaintiff first gives bond in the sum of \$5000.00, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained, such bond to be approved by the Court, or by the Clerk of the Court. Nothing in this order is intended, or shall be construed as prohibiting or interfering in any way with the hearing on plaintiff's original application of September 13, 1949, for authority to discontinue the operation of said trains Nos. 11 and 16 and on plaintiff's supplemental application of November 10, 1949 for authority to keep said trains out of service set for December 8, 1945 at Fayette, Alabama as shown by paragraph 7 of the complaint, or with a decision and order on said application after such hearings.

It Is Further Ordered, that this order expire within ten (10) days after entry unless within such time the order for good cause shown is extended for a like period or unless the defendant consents that it may be extended for a longer period.

It Is Further Ordered, that the plaintiff's application for an interlocutory injunction be set down for hearing on the 15th day of December, 1949 at 10 O'clock A. M. December 15, 1949, at U. S. Court Room, Montgomery, Alabama.

This 6th day of December, 1949, one o'clock P. M.

C. B. Kennamer, Judge, U. S. District Court.

[File endorsement omitted.]

[fol. 51] Received this writ at Montgomery, Alabama on December 6, 1949. Executed by serving copies thereof on the following:

A. A. Carmichael, Attorney General of the State of Alabama, State Judicial Building, Montgomery, Alabama, at 5:05 P. M. December 6, 1949.

Alabama Public Service Commission by leaving a copy thereof with Gordon Persons, its President at 523 Dexter Ave., Montgomery, at 8:00 A. M. December 7, 1949.

Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

Jimmy Hitchcock, Associate Commissioner by leaving a copy thereof with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M. December 7, 1949.

C. C. (Jack) Owen, Associate Commissioner by leaving a copy thereof with Gordon Persons, Alabama Public Service Commissioner at 523 Dexter Ave., Montgomery, Alabama at 8:00 A. M., December 7, 1949.

Benjamin F. Ellis, United States Marshal, Middle District of Alabama, by Jack S. Johnson, Deputy.

Fees \$10.00.

Returned and Filed December 8, 1949. O. D. Street, Jr., Clerk.

[fol. 52] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF THREE-JUDGE COURT—Filed December 13, 1949

The Honorable C. B. Kennamer, United States District Judge for the Middle District of Alabama, to whom an ap-

plication for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I hereby designate the Honorable Leon McCord, United States Circuit Judge, and the Honorable John McDuffie, United States District Judge for the Southern District of Alabama, to serve with Judge Kennamer as members of, and with him to constitute, the said court to hear and determine the action.

Witness my hand this 9th day of December, 1949.

J. C. Hutcheson, Jr., Chief Judge, Fifth Circuit.

(Injunctions—Three Judge Courts—Designation, 28  
USCA, Sec. 2284)

---

[fol. 53] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed December 14, 1949 .

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.
2. To dismiss the action because it affirmatively appears that the plaintiff has not exhausted its administrative remedies before the Alabama Public Service Commission.
3. To dismiss the action because the Court judicially knows that Title 48, Sec. 35 of the Code of Alabama 1940 is constitutional and valid.
4. To dismiss the action because the Court judicially knows that Title 48, Section 106 of the Code of Alabama 1940 is constitutional and valid.
5. To dismiss the action because it affirmatively appears that the plaintiff, Southern Railway Company, has abandoned the operation of its trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi-Alabama state line en-route to and from Columbus, Mississippi without ob-



taining from the Alabama Public Service Commission a permit allowing such abandonment in violation of Sections 35 and 106 of Title 48 of the Code of Alabama, 1940.

[fol. 54] 6. To dismiss the action because it affirmatively appears that the plaintiff's failure or refusal to restore the operation of its said two trains between Birmingham, Alabama and the Alabama-Mississippi state line is in violation Sections 35 and 106 of Title 48 of the Code of Alabama of 1940.

7. To dismiss the action because it affirmatively appears that the plaintiff's failure or refusal to restore the operation of its said two trains between Birmingham, Alabama and the Alabama-Mississippi state line is in violation of a lawful order of the Alabama Public Service Commission.

8. To dismiss the action because it affirmatively appears that the plaintiff is knowingly or willfully violating a lawful order of the Alabama Public Service Commission and that each day's continued violation of said Commission's order by the plaintiff constitutes a separate offense or misdemeanor in violation of Section 399 of Title 48 of the Code of Alabama of 1940.

9. To dismiss the action because it affirmatively appears that the only authority under which the plaintiff suspended the operation of said two trains on October 25, 1949 was service order No. 843 of the Interstate Commerce Commission; that the effective period of said Service Order No. 843 was terminated by Order No. 843A of the Interstate Commerce Commission effective as of 11:59 P.M. November 20, 1949; that prior to the termination of the effective period of the aforesaid service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had notified the plaintiff Southern Railway Company, along with every other railroad company in the State of Alabama, that each and every train which might have been removed under the authority of said Service Order No. 843 should be restored to service within twenty-four (24) hours after said order might be terminated; that also prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had on November 16, 1948, ordered a public hearing of the

[fol. 55] original petition of Southern Railway Company for authority to discontinue its said two passenger trains and of its supplemental petition for authority to not restore the operation of said two trains, and notice of said hearing had been issued to Southern Railway Company and to all interested parties, said petitions being set for hearing in Fayette, Alabama, at the Fayette County Court House, commencing at 9:00 A.M. on Thursday, December 8, 1949; that notwithstanding the aforesaid facts, the plaintiff has continuously since the termination of the effective period of said Service Order No. 843, failed and refused without any lawful authority to restore the operation of its said two trains between Birmingham, Alabama, and the Alabama-Mississippi state line.

10. To dismiss the action because it affirmatively appears that the plaintiff and its officers, agents and employees, or any of them cannot be subjected to any of the penalties or fines under Title 48, Sections 110, 399, 400, or 405 in any manner except by a trial before a court of competent jurisdiction and observing due process of law.

A. A. Carmichael, Attorney General of Alabama.  
Richard T. Rives, Special Counsel. Attorneys for Defendants.

To Honorable J. T. Stokely  
1038 Brown-Marx Bldg.  
Birmingham, Alabama.

Please take notice that the undersigned will bring the above motion on for hearing before the Court at the United States Court Room in the City of Montgomery, Alabama on the 9th day of January, 1950 at 10:00 A.M. on that date or as soon thereafter as counsel can be heard.

A. A. Carmichael, Richard T. Rives, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 56] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed January 12, 1950

Comes Southern Railway Company, plaintiff in this cause and by leave of Court first had and obtained amends its complaint filed herein on December 6, 1949 by adding thereto the following numbered paragraphs and prayer:

19. The hearing on the plaintiff's said original petition for authority to discontinue the operation of said two passenger trains Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, and on its said supplemental petition for authority to keep said trains out of service after they had been discontinued under said service order 843, issued by Division 3 of the Interstate Commerce Commission on October 21, 1949, was set for December 8, 1949 at Fayette, Alabama, stated in paragraphs 7, 9 and 10 of this complaint. The hearing on said original petition and said supplemental petition was duly held by the defendant Alabama Public Service Commission on that date and after receiving the evidence offered by the plaintiff petitioner in support of the petitions and by protestants in opposition to the petitions the cause was submitted and taken under advisement by defendant Commission for a report and order. Such report [fol. 57] and order denying said petitions was entered by the defendant Commission on the 9th day of January, 1950.

20. Plaintiff avers that said order of the defendant Commission of January 9, 1950 denying plaintiff's said two petitions takes the plaintiff's property for public use without just compensation, denies to plaintiff due process of law, denies to plaintiff the equal protection of the law, and unduly burdens interstate commerce, all in violation of the Constitution of the State of Alabama and of the Fifth and Fourteenth Amendments to and the Commerce Clause of the Constitution of the United States and should be held unlawful, null and void and of no effect.

Wherefore, Plaintiff prays supplemental to the prayer of its original complaint herein that an interlocutory injunction pending the final disposition of this cause be issued enjoining defendants, their agents, servants, employees and attorneys, and all persons in active concert and participa-



tion with them jointly and severally from proceeding against the plaintiff, its officers, agents or employees to enforce any penalties or other remedies provided by the laws of the State of Alabama by reason of plaintiff's or their failure or the failure of any of them to restore the operation of said two passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi State Line as required by said order of defendant Alabama Public Service Commission of December 5, 1949 and as is inherent in said order of Jan-[fol. 58] uary 9, 1950, and that on the final hearing of this cause that each of said orders be held unlawful, null and void and of no effect, and that such interlocutory injunction be made permanent.

Marion Rushton, 1203 Bell Building, Montgomery, Alabama, Rushton, Stakely & Johnston, (Montgomery, Alabama). (S.) J. T. Stokely, 1038 Brown-Marx Bldg., Birmingham, Alabama, Benners, Burr, Stokely & McKamy, (Birmingham, Alabama). Of Counsel. (S.) Charles Clark, Southern Railway Bldg., Washington, D. C., Attorneys for Plaintiff, Southern Railway Company.

Filed by leave of Court Jan. 12, 1950. O. D. Street, Jr., Clerk.

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO MOTION TO DISMISS—Filed January 12, 1950

The defendants refile to the complaint as amended the motion to dismiss and each ground thereof heretofore filed to the original complaint, and in addition thereto defendants move the Court as follows:

11. To dismiss the action because it seeks an injunction to stay proceedings in a State Court in a cause not expressly authorized by an Act of Congress and not necessary in aid to the jurisdiction of this Honorable Court, or to protect or effectuate its judgments.

12. To dismiss the action because a Court of Equity should not restrain criminal prosecutions in a state court.

13. To dismiss the action because there is no equity in the complaint.

A. A. Carmichael, Attorney General of the State of Alabama. Richard T. Rives, Special Counsel, Attorneys for Defendants.

Filed in open Court after amendment was allowed by Court, Jan. 12, 1950. O. D. Street, Jr., Clerk.

[fol. 60] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STAY ACTION—Filed January 12, 1950

Without waiving the motion to dismiss this action as amended or any ground thereof, the defendants further show unto the Court that this Honorable Court is asked in the complaint to decide an issue of the constitutionality of Title 48, Section 35 and Section 106 of the Code of Alabama 1940 upon the ground that said statutes are unconstitutional and void as an unlawful delegation of legislative power, and is asked to decide other questions of law and of fact the proper decision of which should be made in the State Courts of Alabama, and that the decision of the Supreme Court of Alabama upon the constitutionality under the state constitution of the statutes of Alabama and upon the construction of such statutes would be final, binding and conclusive upon all other courts, and that this Honorable Court should not undertake a decision on such questions of law or of fact until [fol. 61] the same can be decided in State courts; that the plaintiff's two passenger trains referred to in the complaint are not now in operation and that the plaintiff is suffering no damage, irreparable or otherwise, at this time; that the plaintiff has a right to appeal from the orders of the Commission complained of in the complaint to the Circuit Court of Montgomery County, Alabama, in Equity and thence to the Supreme Court of Alabama, and that the said Circuit Court, or the Judge thereof, upon hearing and notice, after consideration of the testimony taken before the Commission, may direct that such appeal shall stay or supersede the order or action appealed from.

Wherefore, the defendants move this Honorable Court to stay any further actions, orders or decrees in this complaint pending the determination in the Courts of the State of Alabama of the appeals which may be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint.

A. A. Carmichael, Attorney General of the State of Alabama. Richard T. Rives, Special Counsel. Attorneys for Defendants.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO COMPLAINT—Filed January 12, 1950

Come the defendants, jointly, severally and separately, and without waiving the motion to dismiss the complaint or any ground of said motion, do expressly insist thereon, nevertheless for answer to the complaint plead and say:

1. They admit the allegations of paragraph one of the complaint.

2. They admit the allegations of Paragraph two of the complaint.

3. They admit that this suit is of a civil nature between citizens of different states and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00. They deny that this suit arises under the Fourteenth Amendment to the Constitution of the United States.

4. They admit that by Title 48, Section 35 and Section 106 of the Code of Alabama of 1940, plaintiff and other common carriers by railroad are required to file an application with the Alabama Public Service Commission for a permit to abandon all or any portion of its service to the public or the operation of any of its lines, property or plant which would affect the service it is rendering to the public, with certain exceptions not here pertinent, and is further required to obtain from the Commission a permit allowing such abandonment before it can lawfully abandon



operation of passenger trains or any other service it is rendering to the public on its lines of railroad in Alabama. They deny that no standards for the guidance of the Commission are prescribed, and they aver that standards of present and future public convenience and necessity are [fol. 63] prescribed, and that such standards are as definite as are practicable and as the circumstances require or permit. They deny that the said statutes, or either of them, are unconstitutional and void as an unlawful delegation of legislative power or upon any other ground. They admit that the plaintiff on, to-wit, the 13th day of September, 1948, filed with the Alabama Public Service Commission an application for authority to discontinue the operation of two passenger trains in so far as the same are operated in Alabama as alleged in Paragraph four of the complaint. They deny the averments of fact contained in the said application and repeated therefrom in paragraph four of the complaint.

5. They admit that, purporting to act under the authority of Service Order No. 843 of the Interstate Commerce Commission, the plaintiff, effective at 11:59 P. M., October 25, 1949, discontinued the operation of its said two passenger trains, Nos. 11 and 16 between Birmingham, Alabama and Columbus, Mississippi, and at the same time, purporting to act under the same order, discontinued the operation of its other trains as alleged in paragraph five of the complaint. They aver that the effective period of said Service Order No. 843 was terminated by Order No. 843-A of the Interstate Commerce Commission effective as of 11:39 P. M., November 20, 1949; that prior to such termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had notified the plaintiff, along with every other railroad company operating in the State of Alabama, that all trains removed under the authority of said Service Order No. 843 should be restored to service within twenty-four hours after said Order might be terminated. They further aver that also prior to such termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission and on, to-wit, the 16th day of November, 1949, the Alabama Public Service Commission had ordered a public hearing of the original application of plaintiff for authority to

discontinue its said two passenger trains and of its supplemental application for authority to not restore the operation of said two passenger trains, and notice of said [fol. 64] hearing had been issued to the plaintiff and to all interested parties, said applications being set for hearing at the Fayette County Court House in Fayette, Alabama, commencing at 9:00 A. M. on Thursday, December 8, 1949; that, notwithstanding the aforesaid facts, the plaintiff has continuously since the termination of the effective period of said Service Order No. 843, failed and refused, without any lawful authority, and still fails and refuses to restore the operation of its said two passenger trains between Birmingham, Alabama and the Alabama-Mississippi State line.

6. They admit that on the 10th day of November, 1949, the plaintiff filed with the Alabama Public Service Commission its supplementary application for authority to not restore the operation of its said two passenger trains, but they deny the averments of fact contained in said supplementary application and repeated in paragraph six of the complaint.

7. They admit that, due to the crowded condition of the docket of the Alabama Public Service Commission, the application filed by the plaintiff on September 13, 1948, was not promptly heard, but they deny that the plaintiff has requested and urged any special or preferential hearing or has made any repeated offers to have said application set for hearing; to the contrary they aver that the plaintiff made no such offer until on or about October 26, 1949, when by letter dated October 24, 1949, the plaintiff's counsel requested the Commission to set the same for hearing at the earliest consistent date after November 10, 1949. The plaintiff's supplemental application dated November 9, 1949, was filed on November 14, 1949. On November 16, 1949, by due notice to the plaintiff and other interested parties, the application as amended was set for hearing in Fayette, Alabama on December 8, 1949, and was actually heard at said time and place.

8. They admit the averments in paragraph eight of the complaint.

9. They admit the averments of paragraph nine of the complaint, except that they aver that the President of the

Alabama Public Service Commission in a telephone conversation with plaintiff's attorney referred to in said paragraph insisted that the plaintiff's failure or refusal to restore the operation of its said two passenger trains was without lawful authority and that the operation of said two [fol. 65] passenger trains should be restored.

10. They admit the averments of paragraph ten of the complaint.

11. They admit the averments of paragraph eleven of the complaint.

12. They deny the averments of paragraph 12 of the complaint and to the contrary aver that, pursuant to the authority referred to in paragraph eleven of the complaint, the plaintiff and its counsel appeared at the time and place ordered and upon due hearing according to law, the facts set forth in the order of the Alabama Public Service Commission of date December 5, 1949, a copy of which is attached to and made a part of the complaint and identified therein as Exhibit No. 8, were established without conflict.

13. They deny the averments of paragraph thirteen of the complaint and aver that the facts are truly found and reported in the report and order of the Commission dated the 9th day of January 1950, denying the plaintiff's application for authority to discontinue the operation of its said two passenger trains Nos. 11 and 16, between Birmingham, Alabama and Columbus, Mississippi, in so far as the same are operated in Alabama, a copy of which said Order of the Commission is hereto attached and made a part hereof and identified as Exhibit "A."

14. They admit that the plaintiff filed applications for authority to discontinue the operation of other trains as averred in paragraph fourteen of the complaint. They deny the averments of fact contained in said applications and repeated in said paragraph, and they deny that the Commission unduly delayed orders upon said applications, and they deny that the plaintiff has been deprived of its property without due process of law or has been denied the equal protection of the law or that any of its other constitutional rights have been violated. They deny other averments of fact contained in paragraph fourteen of the complaint.



15. They deny the averments of fact and the questions of law and expression of opinion contained in paragraph fifteen of the complaint.

[fol. 66] 16. They deny the facts averred in paragraph sixteen of the complaint. They deny that by the mere failure to restore the operation of its said two passenger trains the plaintiff and its officers, agents and employees will incur liability for penalties and fines as averred in said paragraph sixteen of the complaint, and aver to the contrary that the plaintiff's attention was directed by the Alabama Public Service Commission, in its order dated December 5, 1949, in a case appearing under Docket Number 12,225 on the Docket of said Commission, to Section 399 of Title 48 of the 1940 Code of Alabama, which provides in part that any utility doing business in this State which knowingly and willfully violates any lawful order of said Commission shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$1000.00 for such offense, and that in the case of the violation of said Commission's order, each day's violation shall be admitted to be a separate offense.

They aver that the law does so provide, and that the plaintiff would incur liability for such fine only upon conviction by a Court of competent jurisdiction of a criminal offense of having knowingly or willfully violated a lawful order of the said Commission.

17. They deny the averments of paragraph seventeen of the complaint and deny that they have made any threats in any way against the plaintiff except simply to direct the attention of the plaintiff to Section 399 of Title 48 of the 1940 Code of Alabama in the said order of the said Commission of date December 5, 1949, as set forth in paragraph sixteen of this answer.

18. They deny the averments of paragraph eighteen of the complaint and aver to the contrary that the plaintiff has a full, adequate and complete remedy for any wrongs done or alleged to have been done by the defendants or any of them as provided by the laws of the State of Alabama, including the right to appeal from any final action or order of the Commission to the Circuit Court of Montgomery County, Alabama sitting in Equity, and thence to the Supreme Court of Alabama, and including further the

right and procedure to supersede any such order or decree [fol. 67] of the Commission so appealed from, and the right to have such order or decree of the Commission set aside if the Court finds that the Commission ordered to the prejudice of the plaintiff substantially in its application of the law, or that the order or decree was based upon a finding of facts contrary to the substantial weight of the evidence.

19. For further answer to paragraph nineteen of the amended complaint the defendants admit the averments of said paragraph nineteen and further show unto the Court that a copy of the report and order denying the plaintiff's applications entered by the defendant Commission on the 9th day of January, 1950, has been hereto attached and made a part of this answer and marked for identification as Exhibit A.

20. The defendants deny the averments of paragraph twenty of the complaint.

And now having fully answered the plaintiff's complaint, the defendants pray that they may be hence discharged with their reasonable costs incurred.

A. A. Carmichael, Attorney General of Alabama;  
Richard T. Rives, Special Counsel, Attorneys for  
Defendants.

[File endorsement omitted.]

[fol. 68]

EXHIBIT "A" TO ANSWER

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

Gordon Persons, President.

Jimmy Hitchcock, Associate Commissioner.

C. C. (Jack) Owen, Associate Commissioner.

Lamar Wiley, Secretary.

SOUTHERN RAILWAY COMPANY, a Corporation, Petitioner

Petition:

Petition (as amended): (1) For authority to discontinue its passenger trains Nos. 11 and 16, between Birmingham,

Alabama, and Columbus, Mississippi, and (2) For authority to not restore the operation of said two trains between said points upon the termination of the present suspension of operation thereof under an order of the Interstate Commerce Commission issued on account of the shortage of coal.

### Docket 12221

Submitted: December 8, 1949.

Decided: January 9, 1950.

#### APPEARANCES:

Charles Clark, J. T. Stokley and W. W. Bankhead, for Petitioner.

Oliver E. Young, Sr., Oliver E. Young, Jr., C. M. Holder, Roger C. Landrum, Laurie C. Battle, C. B. Wilson, J. D. Daniel, Vaughn Sumner, L. S. Ackerman, Charles W. Nolen, W. F. Wilson, J. P. Knight, J. L. Carraway, J. A. Poe, M. H. Johnston, M. S. Black, C. R. Caine, D. A. Hutto, Marion Savage, Mr. Lelievre, William Walden, Will Crownover, Mr. Myers and Kelly Savage, for protestants.

#### Report and Order of the Commission

By petition filed with the Commission on September 13, 1948, the Southern Railway Company requested, for reasons therein stated and others to be later shown, that it be duly authorized and permitted in the manner prescribed by law, to discontinue the operation of its passenger trains Nos. 14 and 16 between Birmingham, Alabama and Columbus, Mississippi, insofar as the same are operated in Alabama.

On October 1, 1948, petitioner filed with the Commission certified proof of posting of notice for the required ten-day period at each station and stopping place for the receipt and discharge of passengers on the line affected, to the effect that the said petition was being filed. This resulted in the Commission receiving written protests from a large number of interested citizens at several points on the line of railroad in question.

Due to the crowded condition of the Commission's formal docket at that time and which became progressively more so [fol. 69] and in view of the petitioner not specifically requesting unusual or preferential attention this matter was



not considered as sufficiently extraordinary to require special or expedited handling.

Nothing further was received from petitioner regarding this matter until October 26, 1949, when by letter dated October 24, 1949, petitioner's division counsel requested the Commission to set same for hearing at the earliest consistent date after November 10, 1949.

It appears that on October 21, 1949, just prior to the date of the above request, the Interstate Commerce Commission entered its Service Order No. 843 directing that, effective at 11:59 p. m., October 25, 1949, any common carrier by railroad operating coal-burning steam locomotives and having 25 or less days supply of fuel coal for such locomotives and not having available a dependable source of supply of coal, shall reduce its coal-burning passenger locomotive miles to an amount of 25% less than it operated such passenger locomotives on October 1, 1949. The preamble of this service order expressed the opinion that due to the insufficient production of bituminous coal an emergency existed requiring immediate action in all sections of the country. By stipulation, the said service order was to continue in effect until 11:59 p. m., December 25, 1949, unless otherwise modified, changed, suspended or annulled by order of the Interstate Commerce Commission.

Pursuant to the above service order, the petitioner in the instant proceeding discontinued its passenger trains Nos. 14 and 16 between Birmingham, Alabama, and Columbus, Mississippi, on October 25, 1949. During this temporary interruption of service, to which this Commission interposed no objection purely because of the gravity of the emergency, the petitioner in this cause amended its original request by supplemental petition dated November 9, 1949, and filed on November 14, 1949, wherein it requested for the reasons therein stated and others to be shown at the hearing, that it not be required to restore the operation of said two interstate passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi, when the coal shortage shall have been relieved and that it be duly authorized by the Commission not to restore the operation of said trains insofar as the same are operated in the State of Alabama.

Accordingly and by due notice dated November 16, 1949, to proper parties, the petition, as amended, was set for

[fol. 70] hearing and heard in Fayette, Alabama, on December 8, 1949.

In the meantime, however, the Interstate Commerce Commission by Service Order No. 843-A entered on November 14, 1949, vacated and set aside its Service Order No. 843 as of 11:59 p. m., November 20, 1949. Regardless of this development petitioner had not resumed the operation of passenger trains Nos. 11 and 16 on December 8, 1949, the date of hearing. Therefore the issue in this proceeding is limited strictly to the matter of permanent discontinuance of such service. Furthermore, on January 4, 1950, the Interstate Commerce Commission entered its Service Order No. 845 effective at 11:59 p. m., January 8, 1950, again directing the railroads to curtail their coal-burning passenger locomotive miles but in this case the amount is by 33 1/3 per cent and to expire March 8, 1950. On January 5, 1950 the Commission requested petitioner to advise whether or not the trains involved in this proceeding and not restored at the expiration of Service Order 843 would be embraced in the percentage of curtailment under the new order. Petitioner has advised that it would not.

The operating schedule of trains Nos. 11 and 16 is train No. 11 leaving Birmingham at 4:00 p. m. arriving Columbus, Mississippi at 8:45 p. m. and train No. 16 leaving Columbus at 6:00 a. m. arriving Birmingham at 10:30 a. m. Between these termini petitioner maintains other service by mixed trains Nos. 15 and 12, the schedules being train No. 15 leaving Birmingham at 7:15 a. m. arriving Columbus at 1:15 p. m. and train No. 12 leaving Columbus at 1:30 p. m. arriving Birmingham at 7:30 p. m. Each of the four schedules above call for 4 regular stops and 34 flag stops at intermediate stations. The distance between termini is 122 miles. The scheduled elapsed time of train No. 11 is 4 hours and 45 minutes, train No. 16 is 4 hours and 30 minutes and mixed trains Nos. 15 and 12, which petitioner proposes to retain, is 6 hours.

From the standpoint of convenience and service mixed trains are considerably inferior to the trains Nos. 11 and 16. In the first place the latter represent strictly passenger train service including express, mail and baggage whereas a mixed train generally consists of a series of freight cars with one coach attached and which is divided into three sections, white, colored passenger compartments at each

end and a baggage compartment in between. In this case petitioner's trainmaster testified that presently a combination mail baggage-express car is also used in [fol. 71] mixed trains Nos. 15 and 12 but we presume that this is only a temporary arrangement. Secondly, a mixed train performs freight service enroute by switching and placing freight cars and loading and unloading less carload freight thereby considerably lengthening the fixed schedule and frequently delaying the train beyond such schedule. This type of passenger service is most obnoxious. During the month of November 1949 train No. 15 left Birmingham an average of 8 minutes late on four days and train No. 12 arrived at Birmingham an average of 30 minutes late on twelve days, no similar data was submitted in regard to trains Nos. 11 and 16, but their schedules are no doubt regular. Furthermore, in this particular case, the schedules afforded by the passenger trains Nos. 11 and 16 of arriving at Birmingham, the principal business area and interline connecting point at 10:30 a. m. and departing at 4:00 p. m. are vastly more convenient and desirable than the mixed trains arriving at 7:30 p. m. and departing at 7:15 a. m. From the above it is evident to us that the mixed train service which petitioner will retain is not in any way comparable to that accorded by trains Nos. 11 and 16.

Petitioner has submitted in evidence a detailed description, including photographs, of the consist of trains Nos. 11 and 16 for the purpose of showing the type of equipment ordinarily used on this run. This evidence deals with the operation of a steam locomotive and three cars, the latter consisting of one coach for white passengers, another partitioned coach with colored passengers using the front section and the rear section used as a smoker for white passengers. These cars are of steel construction and air-conditioned except when a "nll-in" is necessary in case of a break-down or an emergency. The other is a combination car with the front section being used for United States mail and the rear section for express and railroad baggage.

During the month of September 1949, the above type of equipment was used on 54 trips, 41 of which were powered by a mountain type locomotive and 13 by a Mikado type. According to our information, those types are identified by wheel arrangement, being 4-8-2(ooOOOOo) and 2-8-2(oOO-OOo) respectively. A qualified witness for petitioner testi-



fied that the mountain type locomotive is used extensively on passenger trains whereas the Mikado type is principally a freight locomotive, nevertheless, both are obviously en- [fol. 72] tirely too heavy and expensive to operate on a passenger train consisting of only three cars.

Petitioner has submitted in evidence operating results of trains Nos. 11 and 16 for the period March 1 to September 30, 1949. According to this tabulation the total revenues, including passenger, mail, express, milk, newspapers, etc., were \$29,971.96. The actual expenses, that is those directly incurred by the operation of the trains, are shown as \$50,112.95. This includes wages and train fuel of \$37,322.10, injuries to persons of \$12,785.85 and damage to property of \$5.00. In addition the apportioned expenses are shown as \$43,161.50 which includes enginehouse expense, locomotive expense, passenger train expense and station expense at Birmingham making a total of \$93,274.91. This results in an alleged loss of \$63,302.95.

The greatest items of these expenditures are obviously caused by the operation of the heavy steam locomotives and the type of coaches necessary with steam power.

The record shows that on 97 one-way trips during the above period a Diesel unit consisting of a motor car and trailer was used. While no photographs were submitted by petitioner, this is evidently a light, compact and inexpensive unit to operate. According to the record, the cost of repairs per mile for this unit averages 13.7 cents per mile. Petitioner shows the cost of repairs to this unit for the 97 one-way trips during this period to be \$2,678.68. Based on 122 miles for each trip, this unit operated 11,834 miles which at 13.7 cents per mile would amount to \$1,621.26. Therefore, petitioner's apportioned cost for repairs to motor car and trailer is evidently incorrect by more than \$1,000.00.

During the 214 days in the above period 428 one-way trips should have been made. If 97 trips were made by the Diesel Unit, 331 were made by the heavier steam locomotive trains. This would mean a total mileage of 40,382. The record shows the average cost per mile for repairs to steam locomotives to be 42.13 cents per mile resulting in a total cost of \$17,012.94 which is approximately the same amount shown on petitioner's statement.

As shown above the estimated per mile cost for repairs to the Diesel Unit is 13.7 cents. If this unit had been oper-

ated during the entire 214 days the cost for repairs for the total of 52,216 miles would have been \$7,153.59 resulting in a saving of over \$12,500.00 for power unit repairs as [fol. 73] summing petitioners figure of \$2,678.68 for repairs to motor car and trailer to be correct.

In addition a substantial saving would be accomplished in wages for the train and engine crews in that reduced personnel is required on a motor car trailer. Also other items such as fuel, lubricants, etc., in the operation of such a unit could afford a further saving.

While our power to check into the efficient management of a railroad is limited to the matter of rate making we do feel that as to the matter of short line passenger service more economical and equally as effective means could be devised to conveniently handle such traffic and not hold the present volume but perhaps increase it. The mechanics of operating a railroad is entirely a matter of managerial discretion but it is our opinion that in this case unnecessary expense is involved.

In the 62nd Annual Report of the Interstate Commerce Commission dated November 1, 1948, said at Page 34

While not unmindful of the many efforts which railroads individually and to some extent collectively are making to increase the efficiency of particular operations, and while appreciative of the fact that most railroad face difficulties in securing outside funds with which to effect cost-reducing fixed improvements, we are of the view that much more must be done to increase the efficiency and reduce the costs of railroad operations. . . . Bold experimentation with new devices and methods seems also to be required in some instances."

We feel that in this case no experimentation has been made to increase the efficiency and reduce the costs of railroad operations leave alone "bold experimentation" but that to the contrary a determination has been made by the management to discontinue the service and the more expensive it can be made the easier the result.

As previously stated petitioner submitted in evidence operating results of trains Nos. 11 and 16 which after all furnish the basis for petitioners case. Two statements were submitted, one covering the period March 1, 1948 to Feb-

ruary 28, 1949 and the other March 1, 1949 to September 30, 1949. According to petitioner, during the first period the direct expenses of operating these two trains were \$78,372.52 in excess of the revenues and during the second period this difference was \$63,302.95. It is interesting to note that the exhibits attached to the supplemental petition filed on November 14, 1949 show operating results for the same periods. According to these exhibits the direct ex-[fol. 74] penses for the first period were \$80,555.78 in excess of the revenues and for the second period the difference was \$63,340.68. This shows that in submitting two statements for the first period they differed by \$2,183.26 and while the two statements for the second period only differed by \$37.73 many items of expense fluctuated. The only constant figures were the revenues. In view of this we question if any confidence can be placed in the accuracy of expenses as shown by the statements submitted at the hearing. Nevertheless, if a loss exists in a minute portion of the system as a whole this loss is cushioned to the extent of about 40 per cent representing what the carrier would otherwise be required to pay in taxes were the loss eliminated.

It is noted that in these statements the petitioner has charged train No. 11 with a total of \$33,898.36 representing injuries to persons. We do not know if the injuries were caused by negligence of employees or contributory negligence of those injured nevertheless this may be termed as an operating expense. However, because the accidents unfortunately happened in these particular periods we do not feel that this amount should here be charged in whole but averaged over the years the train has been operating. The record shows that based upon petitioner's passenger service casualty expenses in the State of Alabama for the ten year period 1939 to 1948 and prorated on basis of the total passenger train miles in Alabama with the train miles of Nos. 11 and 16 the average for these trains over the above period would amount to \$3,526.42 per year.

The area served by these trains, according to petitioner's calculation, has a population of about 10,000. This, of course, only includes the area immediately adjacent to the railroad, however, the outlying districts should also be taken into consideration so it may well be said that 15,000 people are within the area served by these trains. It is



true that bus lines closely parallel the railroad over a portion of the line but a large portion does not have bus service closely available and therefore must depend principally on the railroad. The area traversed by the line is largely inhabited by low income families and it is reasonable to assume that automobiles are not plentiful. No doubt many hundreds depend entirely upon the railroad for their transportation. Passenger traffic itself however, is not the only service upon which these people must depend so vitally [fol. 75-379] but express and mail are of a very important consideration. Even though we have no control over the mail we believe we can give consideration to the inconvenience it might work upon the public when the discontinuance of service might carry with it a loss of adequate mail facilities. We have reason to believe, from the record, that with the discontinuance of trains Nos. 11 and 16 the mail service would not be comparable to that accorded with the trains in service.

The record does not show how long these trains have been operated but we assume for many years. We do not believe that simply because a train service has been maintained for a long period it should be retained after it has served its usefulness but when it is still an essential part of the daily lives of hundreds of people and dozens of towns and communities it is part and parcel of their well being. These people depend upon such service to the extent that its absence would affect the welfare of their communities and instead of an opportunity to grow it would stifle the entire area.

It is our opinion that public convenience and necessity requires the operation of trains Nos. 11 and 16 and that with the exercise of stringent economies and experimentation with new and different devices and methods the petitioner could meet this public need without fear of a burdensome operation.

Upon careful consideration of all the evidence and the facts disclosed thereby we are of the opinion and find that the petition should be denied.

It is therefore ordered by the commission. That the petition of the Southern Railway Company filed on September 13, 1948, requesting authority to discontinue the operation of its passenger trains Nos. 11 and 16 between Birmingham,

Alabama and Columbus, Mississippi, insofar as the same are operated in Alabama, be, and it is hereby denied.

Dated at Montgomery, Alabama, this the 9th day of January 1950.

Alabama Public Service Commission, Gordon Persons, President; Jimmy Hitchcock, Associate to Commissioner. C. C. (Jack) Owen, Associate Commissioner.

Attest. A true copy: Lamar Wiley, Secretary.

[fol. 380] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS its President, and Jimmy Hitchcock and C. C. (Jack) Owens, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

Before Leon McCord, Circuit Judge, and John McDuffie and Charles B. Kennamer, District Judges

OPINION—Filed February 8, 1950

KENNAMER, District Judge:

#### STATEMENT OF THE CASE

Plaintiff, Southern Railway Company, a corporation, organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

The Defendant Alabama Public Service Commission, is an Administrative body, created under the laws of the State of Alabama, and authorized to exercise certain regulatory powers over the Plaintiff and other common carriers.

by railroad within the State of Alabama. (Title 48, Section 1, and Section 106, Code of Alabama, 1940.)

Plaintiff Railway, by complaint as amended, petitions this Court for injunctive relief to enjoin the Defendants, their agents, etc., from proceeding against the Plaintiff, its officers, etc., to enforce any penalties or other remedies provided by the laws of the State of Alabama, by reason of Plaintiff's failure to restore the operation of Trains Nos. 11 and 16, as required by order of the Defendant Commission of December 5, 1949, and as is inherent in the Commission's report and order of January 9, 1950.

The Defendants filed a motion to dismiss the bill of complaint as amended; a motion to stay the proceedings in this Court; and, without waiving any of these motions or the grounds thereof, an answer to the bill of complaint as amended.

The Court heard this cause, by consent of the parties Plaintiff and Defendants, on the Defendant's motion to dismiss, motion to stay the cause in this Court, and on Plaintiff's application for a temporary and permanent injunction, and on the merits of the bill and answer.

After the Court announced the cause would be so heard, the respective parties offered evidence, and at the conclusion of the taking of the evidence, oral arguments were heard by the Court and permission was given the parties to file written briefs with the Court within fifteen days, and the cause was taken under advisement by the Court.

#### QUESTIONS TO BE DETERMINED BY THE COURT

The main question raised by the motions to dismiss and stay, is, whether this Court should entertain this action at this time, irrespective of the impact the orders of the Commission had on the Plaintiff, or in spite of their questionable constitutionality.

The main question presented to this Court by the bill and answer is, whether the orders of the Defendant Commission of December 5, 1949 and January 9, 1950, is a violation of due process of law, as provided for by the 14th amendment to the Federal Constitution, and will result in an illegal confiscation of the Plaintiff's property.

#### FINDINGS OF FACT

1. Plaintiff Railway is a foreign corporation, organized and existing under the laws of the State of Virginia, is en-



gaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

2. The jurisdictional amount of three thousand dollars, exclusive of interest, is involved. The bill of complaint, as [fol. 382] amended, contains allegations of denial of due process of law, as provided for by the 14th amendment to the Federal Constitution. The parties are properly before the Court and this Court has jurisdiction to hear and determine the issues involved. No suit is pending at this time in any of the Courts of the State of Alabama between the parties to this litigation, therefore, the rule of comity is not applicable.

3. Plaintiff Railway did, on September 13, 1948, file an application with the Defendant Commission for authority to discontinue operation in Alabama of Trains Nos. 11 and 16, as required by Sections 35 and 106 of the Code of Alabama, Title 48.

4. Plaintiff Railway did, on October 25, 1949, and in compliance with an order of the Interstate Commerce Commission made to effectuate a saving in the use of coal, discontinue operation of passenger Trains Nos. 11 and 16.

5. Plaintiff Railway did, on November 10, 1949, file a supplemental petition with the Defendant Commission for authority to be relieved of the necessity of restoring to operation Trains 11 and 16 within the State of Alabama.

6. The Interstate Commerce Commission did, on November 14, 1949, issue an order vacating and setting aside the order under which Plaintiff Railway had, on October 25, 1949, discontinued operation of Trains 11 and 16.

7. Plaintiff Railway did, on numerous occasions, after the filing of the original application with the Defendant Commission, and after the filing of the supplemental petition, make requests to the Commission for an opportunity to be heard on the original application and the supplemental petition, but were denied such a hearing by the Commission; the Commission stating that no such hearing would be held until the Trains had first been restored to service.

8. The Defendant Commission did, on December 5, 1949, enter an order requiring the Plaintiff to restore Trains 11

and 16 to service, and calling Plaintiff's attention to certain statutory penalties made and provided for in the event of a refusal.

[fol. 383] 9. Plaintiff Railway did, on December 6, 1949, file in this Court a bill for a temporary restraining order against the enforcement of the order of December 5, 1949, by the Commission. A temporary restraining order was granted by the Judge of this Court and the hearing on the bill for a temporary and permanent injunction was set for hearing before a three Judge Court for December 15, 1949, which hearing, at the request and consent of the Defendants, filed in this Court on December 14, 1949, was passed until the 9th day of January, 1950, and later, at their request and consent, to the 12th day of January, 1950.

10. The Defendant Commission did, on December 8, 1949, hold a hearing at the Court House at Fayette, Alabama, at which time the Plaintiff Railway was given an opportunity and did, present evidence and argument in support of the original application and supplemental petition.

11. The Defendant Commission did, on January 9, 1950, make and file a report and order denying the Plaintiff's original application and supplemental petition.

12. The Defendant Commission took no action on the original application, filed by the Plaintiff with the Commission on September 13, 1948, for authority to discontinue operation in Alabama of Trains 11 and 16, from the time the original application was filed until the trains were discontinued by order of the Interstate Commerce Commission on October 25, 1949.

13. That for a period of about fifteen months prior to the filing of the original application for authority to discontinue operation of trains 11 and 16, the expense of operation of these two trains exceeded the income derived from their operations by over four thousand dollars per month. This financial loss continued from the time the original application was made to the Commission until Trains 11 and 16 were discontinued on October 25, 1949.

14. That, in addition to Trains 11 and 16, Plaintiff Railway operated, and continues to operate Trains 12 and 15 between Birmingham, Alabama, and Columbus, Mississippi,

which Trains 12 and 15, although mixed trains, carrying [fol. 384] both freight and passengers, has adequate facilities for hauling and handling the mail, and makes all regular and flag stops made by Trains 11 and 16. Train 15 is due to leave Birmingham daily at 7:15 a. m. and arrive in Columbus at 1:15 p. m. Train 16 is due to leave Columbus at 6:00 a. m. and arrive in Birmingham at 10:30 a. m. With the discontinuance of Trains 11 and 16, Plaintiff did not close, and does not threaten to close, any of the intermediate stations between Birmingham and Columbus.

15. That with the improvement made in highways, the use of privately owned automobiles, buses, trucks, vans, and other modes of conveyances, have increased, thereby causing a steady decline in the use of passenger trains by the travelling public, especially on short runs such as this one between Birmingham and Columbus, a distance of one hundred and twenty-two miles.

16. That the operation of mixed trains, such as Plaintiff's trains 12 and 15, now in daily service between Birmingham and Columbus, is adequate and sufficient to meet the demands and requirements of the public for railroad passenger service between these two points.

17. That, to require the Plaintiff Railway to continue the operation of Trains Nos. 11 and 16, at this heavy financial loss, which occurred over a long period of time before these trains were discontinued, and, by every prospect and likelihood, would continue should they be restored to service, is an unwarranted and illegal confiscation of Plaintiff's property.

#### CONCLUSIONS OF LAW

The Plaintiff, complaining of the constitutional invalidity of a state-made order, is held to the burden of showing that invalidity of convincing proof.

292 U. S. 290;

302 U. S. 305;

302 U. S. 388.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. There must be [fol. 385] due notice and an opportunity to be heard, the



procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.

227 U. S. 88;

298 U. S. 38;

301 U. S. 292.

When the Commission gives a fair hearing, received and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met, and the question that remains for a federal court is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the order will result in confiscation.

302 U. S. 388.

#### OPINION OF THE COURT

When considered and weighed in connection with the fact that Plaintiff's application for permission to discontinue the two trains had been for about fifteen months on December 5, 1949, before the Commission, and no action whatever taken on the application; the position taken by the Commission that it would not hear nor consider the application until after the Plaintiff restored the two trains to service, irrespective of any great further loss and irreparable injury the Plaintiff would sustain in obeying the demand of the Commission in restoring the trains to service, the least the Commission could have done under the circumstances, in a proper spirit of fairness and justice, would have been to defer making its demand and calling the attention of the Plaintiff to the Alabama statutes providing for the heavy penalties Plaintiff would be subject to if it did not promptly comply with the Commission's order.

The manner of treating the application of the Plaintiff, then pending before the Commission, it appears to this Court, amounted to a threat on the part of the Commission to invoke the penalties provided for in the Alabama statutes against the Plaintiff.

[fol. 386] This Court is of the opinion and so holds, that the motions to dismiss and stay should be, and are, denied and the relief as prayed for in the Plaintiff's bill of complaint as amended should be, and is, granted.

The Attorneys for the Plaintiff will prepare and present to the Court a proper decree in keeping with this findings and opinion.

This 6th day of February, 1950.

Leon McCord, U. S. Circuit Judge; John McDuffie, U. S. District Judge; Charles B. Kennamer, U. S. District Judge.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE  
DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, et als., Defendants

FINAL JUDGM'NT OR DECREE—Filed February 13, 1950

This cause coming on to be heard before a duly constituted Three Judge District Court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant Alabama Public Service Commission at the court house at Fayette, Alabama on December 8, 1949, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein, it is now

[fol. 387] Ordered, Adjudged and Decreed this 13 day of February, 1950, as follows, viz:

(1) that the motions of the defendants to dismiss and to stay proceedings in this cause be denied;

(2) that the orders of the defendant Alabama Public Service Commission dated December 5, 1949 and January 9, 1950 be vacated and declared to be null, void and of no effect; and that a permanent injunction be issued enjoining the defendants Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C.

(Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, and each of them, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said orders or of either of them or to enforce any penalties or other remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of the said orders or either of them by discontinuing and not restoring the operation of plaintiff's local passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line; and

(3) that the bond given by the plaintiff on the issuance of the restraining order herein, which by consent of the defendants was continued in force pending a decision of the cause, be discharged and that the plaintiff as principal and American Surety Company of New York as surety be discharged and relieved of any and all liability thereunder.

Leon McCord, United States Judge, Court of Appeals, Fifth Circuit; C. B. Kennamer, Judge, United States District Court, Middle District of Alabama; John McDuffie, Judge, United States District Court, Southern District of Alabama.

[File endorsement omitted.]

[fols. 388-404] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

#### ORDER ALLOWING APPEAL—Filed April 12, 1950

The petition of the Alabama Public Service Commission, Gordon Persons, as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, the defendants in the above styled cause, for an appeal from the final decree of the three judge District Court made and entered on the 13th day of February, 1950, is hereby granted and the appeal is allowed; bond conditioned to pay the costs of said appeal if same should not be sustained, is



hereby fixed in the sum of \$500.00, such bond, with sufficient sureties, being presented to the Court, is hereby approved.

It is further ordered that this appeal shall be made returnable to the Supreme Court of the United States within forty days from this date, to-wit, on the 20th day of May, 1950, and that this order shall be treated as a citation to the Plaintiff Southern Railway Company, a corporation, as appellee upon said appeal, and to its attorneys of record, to appear in the Supreme Court of the United States and defend said appeal; and that a copy of this order and citation be forthwith served upon said appellee or its attorneys of record.

C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. 405] IN THE SUPREME COURT OF THE UNITED STATES  
STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF RECORD—Filed June 24, 1950

Come the appellants and file with the Clerk the following statement of the points on which the appellants intend to rely:

1. The lower Court erred in overruling and denying the motion of the defendants to dismiss the action, which motion was filed on, to-wit, the 14th day of December, 1949, and was overruled and denied on, to-wit, the 13th day of February, 1950.
2. The lower Court erred in overruling and denying the motion of the defendants to stay the action, pending determination in the Courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of Alabama Public Service Commission complained of in the complaint, which motion to stay was filed in this cause, to-wit, on the 12th day of January, 1950 and was overruled and denied by the Court on, to-wit, the 13th day of February, 1950.
3. The lower Court erred in assuming and exercising jurisdiction of this cause.

4. The lower Court erred in proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint.

The appellants designate the following parts of the record which they think necessary for the consideration of the foregoing points.

1. The original bill of complaint and the exhibits thereto filed December 6, 1949.
  - [fol. 406] 2. The temporary restraining order issued December 6, 1949.
  3. The summons to answer said complaint dated December 6, 1949.
  4. The designation of the three Judges to serve on the District Court of three judges filed December 13, 1949.
  5. The motion to dismiss the action filed December 14, 1949.
  6. The amendment to the complaint filed January 12, 1950.
  7. The amendment to the motion to dismiss the action filed January 12, 1950.
  8. The motion to stay the action filed January 12, 1950.
  9. The answer of the defendants, including the exhibits thereto filed January 12, 1950.
  10. The opinion of the three-Judge District Court, including the statement of the case, the questions to be determined by the Court, the findings of fact, the questions of law and the opinion of the Court filed February 8, 1950.
  11. The order of the Alabama Public Service Commission under Docket No. 12225 of said Commission dated December 5, 1949.
  12. The order of the Alabama Public Service Commission under Docket Number 12221 of said Commission dated January 9, 1950.
  13. The final judgment or decree made and entered February 13, 1950.
- A. A. Carmichael, Attorney General of Alabama;  
M. R. Nachman, Assistant Attorney General of Alabama;  
Richard T. Rives, Attorneys for Appellants.

Service of a copy of the foregoing statement and designation is hereby accepted this 23rd day of June, 1950.

Marion Rushton, of Counsel for Appellee.

[fol. 406a] [File endorsement omitted.]

[fol. 407] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1950

No. 146

ORDER NOTING PROBABLE JURISDICTION—October 9, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 54,652, U. S. D. C., Middle Alabama, Term No: 146. Alabama Public Service Commission, et al., Appellants, vs. Southern Railway Company. Filed June 24, 1950. Term No. 146 O. T. 1950.